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**Patrimonialism, Power and The Politics
of Judicial Reform in Post-Soeharto
Indonesia:
An Institutional Analysis**

Benjamin H. Tahyar

Thesis submitted for the degree of PhD in Law

2012

Department of Law
School of Oriental and African Studies
University of London

Declaration for PhD Thesis

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Abstract

The increasingly voluminous literature on judicial reform in developing countries typically takes little account of the resistance that local elites mount against the reforms as an explanation of why these reforms often fail. In the small number of instances where elite resistance is taken into account, it is treated as a black box, and very little effort is made to analyze the issue of why the elites have an interest in resisting the reforms. This thesis contributes to the literature by explicitly examining the interests of Indonesia's elites in resisting the judicial reforms instituted since the downfall of the Soeharto dictatorship and the reintroduction of democracy. By using institutional theory, the thesis examines the patrimonial basis of elite power in Indonesia and concludes that the 'rule of law' and constitutionalism required by the reforms is fundamentally antithetical to the 'rule of discretion' so necessary to patrimonialism. It is shown that the *Reformasi* movement that led to Soeharto's downfall in 1998 did not result in the destruction of patrimonial rule and the displacement of the country's core group of elites. The continuity of the patrimonial basis of power during the post-Soeharto period has therefore made reception of the rule of law and constitutionalism exceedingly problematic.

The thesis first closely analyzes the informal institutional underpinnings of patrimonial power—corruption and the rule of discretion—under Soeharto's dictatorship to expose the reasons why the regime intentionally rendered the country's judicial system dysfunctional. Next, the thesis explores *Reformasi* and concludes that what actually happened to bring down Soeharto's dictatorship has many of the earmarks of a soft coup orchestrated by elements of the elite, especially the military, and bears little resemblance to the social revolutions normally associated with massive and fundamental institutional changes. The thesis then examines the key reform initiative intended to restore the independence of the judiciary and concludes that this initiative has largely failed. The next two chapters show that some reform initiatives—the Constitutional Court and the Anti-Corruption Court—can be considered successful but conclude that in the case of the Constitutional Court such success must be qualified due to the Court's limited jurisdictional reach that excludes large portions of laws from its purview, and that the Anti-Corruption Court, precisely because it has been successful, is now under attack by the elites. The thesis also concludes that the Commercial Court failed because it directly threatened the institutional basis of patrimonial rule. The

overall conclusion drawn by the thesis is that the rule of law and constitutionalism can only be established by Indonesia's political-economic elites who must be prepared to spend substantial economic and political resources to capture the state and impose their goals upon the rest of society. To the extent that the political-economic elites remain tethered to the institutional underpinnings of patrimonial rule, the prospects for the rule of law and constitutionalism will remain largely unfulfilled.

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Abbreviations/Glossary

ABRI.....	<i>Angkatan Bersenjata Republik Indonesia</i> (name used for the Indonesian Armed Forces before <i>Reformasi</i>).
AICC.....	American-Indonesian Chamber of Commerce, a non-profit organization, headquartered in New York City, established to promote better business ties between American companies and the Indonesian government.
Bappenas.....	<i>Badan Perencanaan Pembangunan Nasional</i> (National Development Planning Agency), a cabinet-level agency of the Indonesian government.
BLBI.....	<i>Bantuan Likuiditas Bank Indonesia</i> (Bank Indonesia Liquidity Assistance), liquidity assistance given by the Indonesian Central Bank to a number of distressed banks during the Asian financial crisis.
DPD.....	<i>Dewan Perwakilan Daerah</i> (Regional Representatives Council),
DPR.....	<i>Dewan Perwakilan Rakyat</i> (People's Representative Council), the Indonesian National Parliament.
GBHN.....	<i>Garis-Garis Besar Haluan Negara</i> (Broad Outlines of State Policy), issued by the MPR on a five-yearly basis as a guide to national policy planning; no longer issued post- <i>Reformasi</i> .
IBRA.....	Indonesian Bank Restructuring Agency, an Indonesian government agency established in the wake of the Asian financial crisis to deal with the assets of distressed banks; abolished on _____.
ICW.....	Indonesia Corruption Watch, an NGO established by LBH to keep track and publicize instances of corruption.
IFIs.....	International Financial Institutions, name used to denote a multilateral financial institution, such as the IMF.
IMF.....	International Monetary Fund.
Kostrad.....	<i>Komando Strategis Cadangan Angkatan Darat</i> (Army Strategic Reserve), an elite unit of the Indonesian army, consisting of between 35,000 and 40,000 men divided into several infantry and airborne brigades as well as field artillery regiments.
KPK.....	<i>Komisi Pemberantasan Korupsi</i> (Corruption Eradication Commission), an independent agency of the Indonesian

government established to investigate and prosecute cases of corruption.

- KRHN *Konsorsium Reformasi Hukum Nasional* (Consortium for National Legal Reform), an NGO established by LBH to promote legal reform in Indonesia.
- LBH..... *Lembaga Bantuan Hukum* (Legal Aid Institute), an NGO established by Adnan Buyung Nasution to provide legal assistance to indigent defendants.
- LeIP..... *Lembaga Kajian dan Advokasi untuk Independensi Peradilan* (Indonesian Institute for an Independent Judiciary), an NGO established to promote judicial independence in Indonesia.
- MaPPI-FHUI..... *Masyarakat Pemantau Peradilan Indonesia—Fakultas Hukum Universitas Indonesia*, a judicial watch NGO established by the Faculty of Laws of the University of Indonesia.
- MPR *Majelis Permusyawaratan Rakyat* (People’s Consultative Assembly).
- NU..... *Nahdlatul Ulama*.
- PAN..... *Partai Amanat Nasional* (National Mandate Party), a political party established, after the downfall of the New Order in August 1998, by Amien Rais, a Muslim politician, designed to appeal to both Muslims and non-Muslims as well as to both *pribumi*’s (native Indonesians) and non-native Indonesians.
- PDI-P..... *Partai Demokrat Indonesia-Perjuangan* (Indonesian Democratic Party of Struggle), a political party established in October 1998 by Megawati Soekarnoputri, Indonesia’s fifth president.
- PKB..... *Partai Kebangkitan Bangsa* (National Awakening Party), a political party established in October 1998 by Abdurrahman Wahid, popularly known as Gus Dur, a Muslim cleric and leader of the NU, who subsequently served as Indonesia’s fourth president; PKB was .
- PKI..... *Partai Komunis Indonesia* (Indonesian Communist Party, it was banned by President Soeharto on March 12, 1966; between October 1965 and March 1966, many of its members were murdered at the instigation of the Indonesian military or imprisoned).

PPP	<i>Partai Persatuan Pembangunan</i> (United Development Party), established in 1973 through the forced merger of four Islamic political parties, implementing a New Order strategy to control political opposition to the regime.
PSHK	<i>Pusat Studi Hukum dan Kebijakan Indonesia</i> (Centre for Indonesian Law and Policy Studies), an NGO established to promote the reform of the Indonesian legal system.
TNI.....	<i>Tentara Nasional Indonesia</i> (the new name given to ABRI, the Indonesian Armed Forces, in the post-Soeharto era).
USAID	United States Agency for International Development.
YLBHI	<i>Yayasan Lembaga Bantuan Hukum Indonesia</i> (Indonesian Legal Aid Foundation), an umbrella organization established in March 1980 to coordinate the activities of local LBH offices.

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Atmasasmita, Romli. Professor of Law at Padjadjaran University (Bandung) and Law & Human Rights Advisor to the State Minister of National Development Planning, in Jakarta on April 23, 2007.

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- Nasution, Adnan Buyung.** Founder and first Chairman of LBH (*Lembaga Bantuan Hukum* or Legal Aid Foundation), in Jakarta on November 6, 2007.
- Pompe, Sebastiaan.** IMF Resident Legal Advisor in Indonesia, in Jakarta on April 6, 2005.
- Reksodiputro, Mardjono.** Secretary of the National Law Commission of the Republic of Indonesia, founding partner of the law firm of Ali Budiardjo Nugroho Reksodiputro and Professor Emeritus of Law, University of Indonesia (Jakarta), in Jakarta on May 3, May 11, and June 6, 2005 and October 25, 2007.
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- Saleh, Abdul Rahman.** Former Deputy Chief Justice for Supervision of the Indonesian Supreme Court (2002-2004) and former Attorney General in President Yudhoyono's Administration (2004-2007), in Jakarta on October 24, 2007.
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Chapter 1

Introduction

Judicial reform has become an important, almost central, aspect of development intervention. Whereas in the past, development intervention had consisted mainly of lending money for physical infrastructure projects, such as bridges and roads, or better farming techniques and the commercialization of agriculture, the past three decades or so have seen increasingly large amounts of money being loaned for projects aimed at improving citizens' access to the courts, increasing the skills and competence of the personnel employed in the court and legal system generally, introducing advanced technology already in service in the judicial systems of developed countries, such as computers and information management, and, probably most importantly, promoting the independence of the judiciary from executive control. In some cases, reform projects have even gone a step further to include judicial review of statutes and executive action. Multilaterals such as the World Bank, the Inter-American Development Bank (IDB), and the Asian Development Bank loaned over US\$500 million to 26 countries for judicial reform between 1994 and 1999 (Messick 1999). Bilaterals such as the United States Agency for International Development (USAID) have spent similarly impressive amounts for similar projects. More recent accounting has shown that the money loaned for such projects from 1990 through 2006 by the World Bank alone came close to US\$3 billion (Trubek 2006).

The ideology or theory behind the remarkable growth in spending for these projects has been democracy promotion, on the one hand, and the discovery that "institutions matter" for the development of free markets, on the other. Typically, the latter is more important among the multilaterals, although the IDB lends money for both reasons, while the former is more important for bilaterals. USAID started to fund such projects in the early 1980s in Central American countries, starting with El Salvador, where the United States was committed to stemming the spread of communism by fostering democracy. It was argued at the time that improving the administration of justice was an important part of the process of democratization. Eventually, USAID judicial reform projects spread to the rest of Latin America and to Central and Eastern Europe and the former constituent republics of the Soviet Union after its downfall in 1989 (Messick 1999).

Meanwhile, the somewhat dismal results of “shock therapy” remedies (essentially, the advocacy of abrupt and near-complete elimination of the state’s role in the economy, popularly known as the ‘Washington Consensus’) administered in the post-socialist countries resulted in new thinking about the relationship between the state and the free market. As a result of these failures, development specialists at the multilaterals and in academia realized that the state does indeed have a role to play in fostering free markets. The state had to protect property rights and to ensure the enforceability of contracts. Institutions—that is, rules—are important to free markets because they provide the long-term predictability required for investor confidence. Predictability is important because investments often require a decade or more to turn a profit. Investors will not invest unless they can be assured that a country’s institutional framework (including, especially, its legal and judicial systems) is stable, such that, contracts signed today will be enforceable a decade or two hence. In this way, the so-called ‘post-Washington Consensus’ that eventually developed saw the need to reintroduce the state to the free market as provider of that institutional stability. This consensus has become the existing development paradigm, particularly among the multilaterals.

Because the legal and judicial systems of developing countries are typically sub-optimal or even dysfunctional, a great deal of money was soon invested into improving them. In Indonesia, the process began in earnest in the wake of the 1997 Asian financial crisis. As a condition for agreeing to help the Indonesian economy to get over the crisis, the International Monetary Fund (IMF) required the Indonesian government to adopt bankruptcy law reforms and, because of its notoriously corrupt and dysfunctional judiciary, to establish a new court to hear the bankruptcy disputes. By its Letter of Intent to the IMF, dated April 10, 1998,¹ the Indonesian government undertook to create such a court and to staff it with specially trained judges who would be required to issue its rulings through reasoned written opinions. A great deal of the technical legal assistance provided by the IMF at this time consisted largely of training programs for Indonesian judges taught by foreign legal and bankruptcy experts.

As shown subsequently in this thesis, the new Commercial Court that was established for this purpose quickly proved to be a disappointment to anyone expecting reasoned and impartial judgments to come from it (Linnan 2010; Tahyar 1999). Yet, the Commercial Court was supposed to be a lynchpin in Indonesia’s strategy to regain

¹ See Appendix VII of the Letter of Intent, available at: <http://www.imf.org/external/np/loi/041098.pdf>.

investor confidence—especially the confidence of foreign banks—to get them to start lending again in order to give the economy a much-needed boost. The Commercial Court was also designed to serve as a beachhead for the country’s drive to reform its judiciary as a whole. These were obviously very important national policy goals. Yet, the Commercial Court very clearly failed. Other reform initiatives, particularly the project designed to increase judicial independence, have also largely failed. The central question addressed in this thesis is why such failures were tolerated when success would seem to be so important for the achievement of Indonesia’s vital national goals?

It is argued that the answer to this question lies in the consequences that successful judicial reform actually entails for the structure of power in Indonesia. In short, successful judicial reforms threaten to undermine that structure of power. Thus, failure was not merely tolerated, it was aided and abetted. Commentators have argued that, in many developing countries, the prevalent form political domination closely resembles what Max Weber (1978) called patrimonialism (Anderson 1972; Eisenstadt 1973; Ghai 1993b; Roth 1968). Briefly, it is a system in which political power is maintained through a series of patron-client relationships whereby the patron—in return for the client’s political support—provides him with ‘benefice payments’, viz. by appointing him to a public office through which the client can extort money from the public. Here, ‘public office’ can mean either a government position or a monopoly over a specific economic sector or market granted by the government to a private company. Corruption or rent-seeking is therefore a central element of patrimonial rule. Indeed, corruption or rent-seeking is more than that; it is essential to patrimonialism. It is the life-blood of the system. No corruption, no patrimonial rule. But how is corruption facilitated?

Like any other form of legitimate² political domination, patrimonialism has institutions, or rules, that underpin it. In a large, far-flung and complex country like Indonesia, for example, how else is control to be exercised and the state administered? Bureaucracy is therefore not inherently alien to patrimonial rule. But patrimonial bureaucracy has little in common with the legal-rational bureaucracy that typifies the in-

² Legitimate in the sense that it is accepted by a majority or plurality of its subjects and that domination does not rest solely on coercion and violence. In this sense, liberal democracy is another form of legitimate political domination. Continuing legitimacy is typically premised on the system’s ability to generate economic wealth and to provide at least a modicum of public welfare. As the demise of Germany’s Weimar Republic showed, liberal democracy has been rejected at least once in favor of a different type of political system.

dustrialized nations of the West. According to Weber's "ideal type",³ a patrimonial official has no "*objectively defined official duty*" (1978: 1041, original emphasis). Instead, a patrimonial official—who is a patron in his own sphere—can make decisions, "just like the lord, according to his personal *discretion*", to reward or punish his own clients (ibid., emphasis added). In turn, the official's own patron exercises similar discretionary power over him and so on. Thus, patrimonial bureaucracy is typified by "completely arbitrary decision-making", limited only by the prescriptions of tradition, with the former "serving as a substitute for a regime of rational rules" (ibid.). It is this "rule of discretion" (Lev 1978: 59-60) that facilitates the corruption so essential to patrimonial rule. Under the system, an official is chosen not only for his competence and organizational abilities but also, and perhaps more importantly, for his loyalty. Often that loyalty far exceeds his abilities. Under a rule of discretion, such an appointment can always be justified even when that justification is not possible under a system of objective and general rules. Simply put: no rule of discretion, no corruption. It is as important to corruption as corruption is to patrimonial rule. Logically, therefore, no rule of discretion means no patrimonial rule. Clearly, then, the rule of discretion supports a structure of power—primarily political but also, in very important ways, social and economic. In this way, patrimonialism itself can be considered as a set of informal (i.e., unwritten) institutions that establish the ground rules about how power is achieved, maintained, contested, and exercised. In a very real sense, therefore, patrimonialism often acts as the (unwritten) 'constitutional' underpinning of a political regime's hold on state power in such countries.

In any country under patrimonial rule, any reform that would establish judicial independence and set up a system of objective and general rules—in other words, any reform that would bring about the rule of law—would corrode the foundations of the rule of discretion. The two systems compete and obedience to one necessarily means disobedience to the other. In the long run, the rule of law, if firmly grounded and widely accepted, would displace the rule of discretion and bring down patrimonial rule *and*, very probably, the elites—primarily political but also economic and social—that have profited from it. Not surprisingly, those elites would attempt to do everything in their power to resist such reforms. What is obvious, moreover, is that the elites do not

³ "Ideal type" in Weber's sociology is a typological construct consisting of the prominent qualities of the particular sociological phenomenon under study. It is a concept similar to what American political scientists would refer to as a 'model'. The term does not connote any value judgment on the part of the observer.

just simply consist of people within the judiciary but also come from the executive, the legislature, the bureaucracy, the military, and the business world. Recall that an ‘official’ of the regime can also be private-sector businessmen to whom monopolies have been granted. Thus, successful judicial reform would also imply a fundamental reorientation of the economy, at least in the way that business is normally conducted. Finally, because any system of legitimate political domination requires some ideological justification, the elites can even count among their numbers those intellectuals and academics who have staked their careers and thus their professional reputation as apologists and ideologues for the system. To these elites, successful judicial reform does not simply mean a more efficient and impartial court system; it effectively entails fundamental changes to an entire way of life.

To be sure, there are bound to be elements from any and all of these sectors who are reform minded. Indeed, as will be demonstrated in this thesis, a large segment of the private bar—human rights advocates but also elite corporate lawyers—in Indonesia were at the forefront of the demand for root-and-branch reform of the judicial system. But, for the most part, it is logical to expect the beneficiaries of patrimonial rule to mount some form of resistance. What types of resistance offered and the power behind it will depend on the prevailing political climate. Under stable patrimonial rule, although it is doubtful that such a system exists in the real world, resistance can be expected to be robust and overt. But in developing countries, most of which are at least partially dependent upon foreign aid, one can expect patrimonial rule to be under constant pressure from multilaterals and bilaterals given the existing development paradigm. Here, resistance will most likely be covert and sporadic, especially if there are strong domestic constituents for reform in addition to foreign pressure. What strategies might patrimonial elites use to defeat or, at least, delay reform efforts aimed at destroying the rule of discretion?

As will be shown in subsequent chapters, the strategies employed in Indonesia after the fall of Soeharto’s regime include foot-dragging, sloppy legislation, failure to fund, creating overly ambitious administrative structures for new courts, and even a high-level conspiracy to discredit and emasculate the highly successful and popular independent anti-corruption prosecution agency. Admittedly, there is no clear nexus between cause and perceived effects in many of these cases. In the case of foot-dragging, for example, it is hard to show that legislators and executive officials purposely slowed down their pace in order to torpedo a particular reform initiative. One

can only show cause and effect and draw tentative conclusions about the relationship between them. But the effect on reform initiatives of the almost somnolent pace at which bureaucrats and politicians worked is certainly suggestive. In any event, given the failures and clear lack of success of many judicial reform projects,⁴ it may be argued that these cases are worth investigating.

Yet, in the rich and increasingly large literature on judicial reform, very little attempt has been made to address explicitly the issue of elite resistance. Indeed, some commentators would deny that elite resistance is a problem at all. Hammergren (1998), for example, argues that when judicial reform fails it is typically due to elite indifference rather than elite opposition. Her argument implies that the elites in the countries she investigated, Latin America generally and Peru in particular, are simply not interested in the judiciary and see it neither as a tool nor as a threat. Thus, the dysfunctionality into which the judiciary has fallen in these countries is seen purely as a result of neglect—an accidental if predictable outcome rather than an intentional result. By contrast, in chapter 2 of this thesis, it is argued that the dysfunctionality of the Indonesian judiciary was precisely the result of deliberate state policy. An efficiently functioning judiciary being anathema to the rule of discretion, the Indonesian government purposely set out to emasculate it by compromising its independence, corroding the professionalism of its judges, and otherwise insuring that verdicts can be arranged to protect the interest of the executive and the elites that support the regime. Dysfunctional though they were, courts were still necessary to the regime, however, because they still lent a patina of legitimacy and prevented the appearance of total lawlessness.⁵

When resistance to reforms is acknowledged—and most recent commentaries would—its source is often attributed to ‘vested interests’. But sometimes these vested interests are not explicitly examined and identified; nor is any inquiry made as to why precisely these interests are against the reform (Ungar 2002; Popkin 2000). Typically, however, these interests are identified with the judiciary and the people most likely to profit directly from corrupt judges, such as civil servants generally and administrative court personnel in particular (Buscaglia et al. 1995; Dakolias 2001). Resistance therefore comes from discrete sectors of society and involves only a part of the elite, such

⁴ Golub (2006), for example, argues that these reforms are not sustainable.

⁵ E.g., Moustafa & Ginsburg (2008: 5) pointed out that “authoritarian rulers may . . . attempt to make up for their questionable legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule.”

as judges. The conclusion that must be drawn is that elites have different, divergent and, sometimes, even opposing interests. As Hammergren (1998) has argued, the elites are less monolithic than one might imagine. In short, the elites do not constitute a coherent social class. To a certain extent, this observation has to be true. Individuals, even if together they form a social class, do have individual goals and agendas. If reforms impact different segments of the elites differently such that only the interests of some are adversely affected, then it would be logical to expect divergent reactions to the reforms. The outcome of resistance to such reforms would depend on the relative strengths of the various elite segments involved. For example, Rosser (1999) showed that intellectual property law reform in Indonesia affected different segments of the elite differently and, in the end, only laws affecting the less-politically connected were enacted while legislation that would have adversely affected the interest of those closer to the center of power was shelved.

In the case of judicial reform, however, the interest affected is shared by the elites as a social class. In this case, one would have expected greater class solidarity in the elites' resistance to the reforms. A number of examples discussed in chapter 4 below show that disparate strains of the elite do band together in temporary and shifting alliances to defeat or, at least attempt to defeat, threats to their class interest. For example, a diverse coalition of interests banded together to oust President Wahid when his reformist policies proved too threatening to the cozy rent-seeking arrangements politicians had established both in parliament and the government. Several years later, a businessman joined forces with high-ranking officers in the national police and prosecutors in the Attorney General's Office to frame and discredit two commissioners from the Corruption Eradication Commission. In chapter 3, the discussion again shows that a diverse coalition of elites banded together to orchestrate the ouster of a very reform-minded finance minister whose reform efforts would have undermined the rent-seeking arrangements at the Tax Directorate and harmed the interests of many powerful members of the elite who depended upon those arrangements to reduce the tax obligations of the companies they controlled.

Commentators also frequently blame the lack of a bottom-up approach and absence of deep civil society involvement in the reform efforts for their failures (Dakolias 2001; Hammergren 1998; Pásara 1998; Popkin 2000). A version of this argument emphasizes local ownership (Popkin 2000). In brief, they argue, for judicial reform to succeed, it needs to be built from the ground up rather than imposed from above by the

government or from the outside by foreigners such as multilaterals. In addition, it requires the participation of as broad a spectrum of civil society groups as possible. Thus, the process envisioned is participatory in that the input of as many different viewpoints reflecting different interests, including those of the poor, should be accommodated so that a broad consensus on what must be done can be reached. Only by this approach can a deep commitment to reform be established because only then will the reform process, in a very real sense, be ‘owned’ by all the stakeholders involved. In many respects, these arguments are compelling and logical. It is very hard to argue against the notion that citizens, either as individuals or in groups, should not be encouraged to participate in a project that would, to a lesser or greater degree, affect them all.

But there are a number of problems inherent in these arguments. Jensen (2003) pointed out that these broad constituencies are usually absent from the process because large groups tend to have significant collective action problems and encounter high transaction costs when they try to act collectively. Consulting all, or even most, of the stakeholders involved would not be realistic because “those who reasonably should be considered stakeholders are simply too numerous” (357). Further, since numerous aspects of judicial reform can only be done by the state (e.g., the reform needs the cooperation of the legislature to enact relevant laws and the executive to implement and fund them), the participatory approach assumes that the state in these developing countries is sensitive to popular opinion. In fact, many—if not most—developing countries are ruled by authoritarian states that regularly ignore popular demand except when doing so would trigger a rebellion. Even in such circumstances, some authoritarian regimes would resort to violence rather than relent and accommodate its citizens. Tiananmen Square 1989 comes quickly to mind.

With state participation such a necessary component of the reform process, this thesis focuses instead on the issue of who controls the state. To the extent that the state is controlled by people unreceptive to the prospect of reform, it would be idle to suppose that they would implement such a reform. Or, if implemented because of external pressure and/ or domestic demand, that the reform would be carried out fully and properly. The ‘state’ here includes a whole host of state institutions and not simply the judiciary; thus, the executive, the legislature, the bureaucracy, and the military would also be counted. Money, so important to the reform effort, is under the control of the executive and, sometimes, also under the legislature. Both Solomon & Fogle-

song (2000) and Hammergren (1998) pointed out that lack of funding was often a source of failure. Yet, neither seemed to question why there was a lack of money for the reform projects. True enough, it is difficult to show that funding was intentionally choked off with the objective of killing the reform. Given the external and domestic environment in which these reforms take place, no developing country government would admit as much. But, as any good detective would ask: *cui bono*? At the very least, failure to fund, or to fund adequately, would indicate a lack of seriousness. But why the lack of seriousness, if judicial reforms constitute such an important national policy objective?

A number of commentators explicitly acknowledge that judicial reform is not only inherently political but also centers on the issue of power (Chavez 2004; Finkel 2008; Ginsburg 2003). The literature was developed in the context of countries transitioning from authoritarianism to democracy and addresses the question why politicians who had been able to govern without being hamstrung by judicial oversight would choose to support reforms that strengthened the independence of the judiciary and thus limit their own power? In each analysis, the answer hinges upon electoral uncertainty. Politicians currently in power who believe that they might be voted out of office in the next election would typically choose to strengthen judicial independence as an “insurance” against their political rivals manipulating the judiciary to their advantage once they have gained the upper hand. Where politicians feel assured of maintaining office for the foreseeable future, however, they are unlikely to see the need for an independent judiciary.⁶

This approach seems to make a great deal of sense. Politicians in power balance the cost of judicial reform (viz. a more constrained room in which to maneuver) against the possible benefits (viz. more foreign investment because of greater legal certainty, enhanced legitimacy, etc.) and always find that the cost outweighs the benefits until they see the possibility of reversal in electoral fortunes. But why should the desire for an unconstrained room for maneuver be restricted to politicians in power? Why shouldn't opposition politicians also want the same freedom of movement? The motivations of politicians, whether in or out of power, are not adequately addressed.

⁶ The logic is not new. It was initially proposed by Landes & Posner (1975) to reconcile the existence of an independent judiciary in the United States with the interest-group view of American politics favored by political scientists and economists. The logic was subsequently developed by Ramseyer (1994) to show why there was less judicial independence in Japan than in the United States despite the fact that both countries equally supported an independent judiciary on paper.

Instead, the approach assumes as unproblematic that different political parties actually represent different interests as they do in the developed countries of the West. But in many developing countries, different political parties often do not represent divergent socio-economic interests. In Indonesia, for example, labor has no real representation in parliament. Nor is there any party representing left-wing political ideologies. Indeed, except for the Islam/secular divide,⁷ it is hard to distinguish among parties in terms of the range of possible interests they might represent. In Indonesia, politics is more typically concerned with dividing the spoils that come from control over public office. Opposition parties have as much interests in a weak and corrupt judiciary as the parties in power.⁸

Because it does not take a closer look at the reasons why politicians may or may not want independent judiciaries, the approach's analytic value may be limited. For example, Finkel (2008) argues that Mexico implemented reforms in the 1990s that resulted in an independent judiciary. As proof, Finkel offered a number of cases in which the Mexican Supreme Court ruled against the government (98-102). But Helmke (2005) suggests that in ruling against the government, judges may be "strategically defecting" if they see a good possibility that that government may not remain in power for much longer; that is, judges rule against the government as a means of establishing good relations with the opposition politicians who may soon hold the reins on power. Thus, ruling against the government may be a sign of strategic behavior to curry favor with an incoming administration rather than a sign of independence from the politicians currently in power. Moreover, according to Magaloni & Sánchez Galindo (2001), the Mexican Supreme Court mostly ruled in favor of the PRI, the ruling party, from 1995 until 2000 (cited in Fix-Fierro 2003). Indeed, the Supreme Court continued to rule in the PRI's favor even after it lost power and thereby forced the PAN government that succeeded it to roll back some of its policies by ruling against them (Fix-Fierro 2003).⁹ In any case, the success of the Mexican judicial reform of the 1990s was called into question by a United Nations report released in 2002, which

⁷ Indonesian Islamic parties have tended to move away from a strictly Islamic approach in order to attract votes from mainstream voters.

⁸ The government consists of a coalition of parties.

⁹ Magaloni & Sánchez Galindo (2001) offered an alternative explanation as to why the PRI initiated judicial reforms: an effort to strengthen its legitimacy in a time of increasing political uncertainty when the authority of the president was constantly being challenged. Interestingly, according to this explanation, the PRI initiated the reforms precisely because it believed that the Supreme Court would remain politically subservient to the ruling party. The appearance of independence would then give the Court's decisions in favor of the PRI enhanced legitimacy (cited in Fix-Fierro 2003: 252-53).

concluded that corruption in the judiciary remained widespread despite the reforms.¹⁰ More recently, a series of incompetently handled cases eventually forced President Felipe Calderón to initiate court reforms in 2008.¹¹

Finkel's conclusions about the efficacy of Mexico's judicial reform efforts were overly optimistic. At least, in part, this was because Finkel took as given that what mattered was the configuration of the party system. The motivations of the politicians within these parties as to why they would or would not favor an independent judiciary were not closely examined. In Indonesia, close examination of politicians' motivations shows that the threat that judicial reform posed was to the existing system of political institutions, or rules, that was shared by all or most politicians. This system of political institutions or basic rules are more or less universally accepted by the elites and imposed upon the rest of the population, albeit justified by tradition and myths—ideologies—developed by those elites. In many developing countries, judicial reforms are more likely to subvert this set of basic institutions and not simply the particular regime that happens to be in power. It is argued in this thesis that for judicial reform to succeed, it has to be supported by powerful people—the elements of a new elite—who have managed to capture the state and who favor replacing the old set of basic institutions with new ones in which an independent judiciary plays a prominent role.

In the chapter that follows, the thesis argues that the Indonesian judiciary was purposely corrupted and made dysfunctional by Soeharto's New Order regime because a functional judiciary would have been inconsistent with the set of basic institutions that supported the regime's patrimonial rule. In chapter 3, the thesis examines the *Reformasi* movement that helped bring down the New Order and whether the movement has ushered in a new elite—in favor of the rule of law and judicial independence—that has managed to capture the state. Chapter 4 looks at reformers' attempt to establish judicial independence by taking the administration of courts away from the Department of Justice and giving it to the country's Supreme Court; that is, to put administration and substantive judicial decision-making under "one roof". The chapter explores the issue of whether this reform initiative has actually led to a more independent and less corrupt judiciary and attempts to determine whether successive ad-

¹⁰ 'UN Releases Controversial Study on Mexican Judicial System', *SourceMex Economic News & Analysis on Mexico*, April 17, 2002.

¹¹ 'Bungled Cases Show Weakness in Mexican Judiciary', *Reuters*, July 14, 2010.

ministrations after the downfall of Soeharto's regime have shown a break from or continuity with the past. Chapter 5 examines the other significant reform initiative taken under *Reformasi* to endow the judiciary with review powers over statutes and government action. Here, the reform concerned the establishment of the Constitutional Court that would be given the jurisdiction to hear review petitions; specifically, the political constellations that eventually determined the limits of its jurisdiction, including the decision to vest review powers over government actions, not for their constitutionality but for their consistency with statutes, in the Supreme Court and to restrict the Constitutional Court to the task of reviewing statutes. Chapter 6 looks at two new courts established during *Reformasi*—the Commercial Court and the Anti-Corruption Court. The Commercial Court is significant because it was the first court established after the fall of the New Order and could be viewed as a first attempt to curtail the discretionary power of Indonesia's elites. The Anti-Corruption Court is also significant because it represented a bold attempt to destroy the corruption network that is so essential to patrimonial rule.¹²

The thesis concludes that judicial reforms in post-Soeharto Indonesia resulted in some successes—the Anti-Corruption Court and the Constitutional Court—but also significant failures—the Commercial Court and, more importantly, the “one roof” initiative. It is argued that *Reformasi* failed to establish a new elite capable of seizing direct control over the state in order to implement its reform agenda. Instead, the downfall of the New Order should be attributed less to the ‘people power’ that *Reformasi* represented and more to a ‘soft coup’ orchestrated by the elites (including, especially, the military) concerned about controlling a succession of power once it became evident that Soeharto's regime was rapidly losing its legitimacy vis-à-vis ordinary Indonesians. This turn of events practically insured the continuity of the elites' position in Indonesian politics and the place that patrimonial rule, i.e., clientelism, corruption, and the rule of discretion, plays in it. Given this continuity, it is difficult to see how the *negara hukum*—the rule of law in Indonesian—can establish a strong foothold in Indonesia.

¹² There are many new courts established recently in Indonesia that are not covered in this thesis. Most of these courts have limited jurisdictions, e.g., the Fisheries Court and the Labor Court. These courts have been left out of the discussion because most of them do not impose significant political-economic repercussions. Two exceptions are the Administrative Courts and the Human Rights Court. Adriaan Bedner (2001, 2010) has commented extensively on the Administrative Courts, and Mark Cammack (2010) has recently examined the Human Rights Court.

Chapter 2

Dysfunctional by Design: The Indonesian Judiciary Under the New Order

By the end of Soeharto's New Order in 1998, the Indonesian judiciary had become largely dysfunctional. Many, if not most, Indonesian judges at all levels of the judicial hierarchy—not least at the *Mahkamah Agung*, the country's Supreme Court—were incompetent, highly susceptible to political manipulation, and corrupt. Professionalism and moral integrity had gone by the wayside for many members of the judiciary. The government could be assured of a favorable verdict in cases where its interests are at stake. There are, of course, notable exceptions to the general malaise. But in the few instances where an independent judge has decided a case against the government, the judges at the Supreme Court could always be relied upon to rectify things. Pompe (2005: 123) noted that the Supreme Court decided all significant political cases in favor of the government throughout the New Order. As a state institution, the Indonesian judiciary is therefore deeply tainted by corruption and can be easily manipulated by political forces. It has been clearly marginalized. Why has this been allowed to happen?

This chapter argues that the marginalization of the judiciary as a state institution happened not as a result of neglect or indifference but as a result of deliberate state policy. In part I, this chapter first examines a number of cases to illustrate the extent to which the Indonesian judiciary has become dysfunctional. It then goes on to address the question of *how* the government consciously undermined a judiciary that had inherited a tradition of limited independence from its colonial past. It will show that the government's efforts to take away the independence of the courts led to the abandonment of professional standards and eventually to corruption. Part I also analyzes the ideological foundations of the New Order and discusses how a group of military lawyers and *adat* or customary law scholars cobbled together an ideology derived from German romanticism and an idealized vision of traditional Indonesian society to justify a political system in which the judiciary is used as a tool to implement government policy.

Part II discusses the question of *why* the Indonesian government considered it necessary to undermine its own judiciary. Here, the patrimonial nature of Indonesian politics is discussed. It is argued that the way political power is maintained under pat-

rimonialism requires that leaders have the widest possible discretion in determining distributive policies and the way they are implemented. Under this system, the government cannot afford to be held accountable according to an objective system of rules. Each policy and how it was carried out had to be determined solely on the basis of how it helped to maintain or increase the power of the country's political elite. In many circumstances, these policies violated not only the spirit but also the letter of the law. An independent judiciary that can honestly and competently examine government policies and actions according to objective standards would therefore undermine the political power of the elite. Thus, the patrimonial nature of Indonesian politics actually required a dysfunctional and politically subservient judiciary.

In part III, the chapter then critically examines the way that commentators have understood and used the concept of patrimonialism. The chapter concludes that patrimonialism is better understood as a particular method of governance that certain regimes employ to deal with their political problems rather than as a way of describing their traditional nature or explaining the instability of regimes that exhibit patrimonial features. Patrimonial governance can, in fact, be stable and survive the fall of regimes. As such, it is argued that patrimonialism is a type of informal institution. According to the logic of institutionalism, such informal institutional arrangements are highly stable. Change will only come about if there is a sufficiently powerful constituency willing to take action to change them.

I. A Sketch of Dysfunctional Judiciary

Part A provides a brief description of four cases illustrative of the incompetence and corruption of the Indonesian judiciary. Part B discusses the history of the Indonesian judiciary from its colonial roots to the end of the New Order. The discussion shows that the judiciary in Indonesia has had a history of limited independence. Part C shows how the Indonesian government deliberately sought to undermine and emasculate the judiciary to serve its political purposes. The discussion concludes that the government's conscious policy to undermine the judiciary eventually led to a dysfunctional and corrupt state institution.

A. Incompetence and Corruption

The Indonesian judiciary is often complicit in suppressing dissent and silencing the press in Indonesia. In the *Tempo* case (1996), for example, the Supreme Court up-

held the government's decision to withdraw *Tempo* magazine's publishing permit. On June 11, 1994, *Tempo* magazine had published an article accusing the then-minister of research & technology, B.J. Habibie—a Soeharto protégé—of corruption involving the procurement and refurbishment of a large number of mothballed ships from the East German navy (Millie 1999). Later that month, on June 21, the Minister of Information notified *Tempo* that its publishing permit was being withdrawn. It was clear that the withdrawal of the publishing permit resulted from the publication of the article on B.J. Habibie. Soeharto had publicly complained about the article (Millie 1999; Dean 1999). Thus, the withdrawal of the permit was clearly in violation of Article 4 of Law No. 21/1982, which prohibited the government from censoring or banning the Indonesian press on the basis of content.

The Minister of Information had justified his decision withdrawing *Tempo*'s licence on the basis of Minister of Information Regulation No. 1/1984. Article 33(h) of the Regulation stated that the Minister, after consulting the Indonesian Press Council,¹ may withdraw a publisher's licence if it appeared that the publication "no longer reflects . . . the existence of a press which is healthy, free and responsible" (Millie 1999: 271). *Tempo*'s publisher argued that the ministerial regulation was clearly in conflict with a superior law (viz. Law No. 21/1982) and must be declared invalid. The trial court agreed with *Tempo*. On cassation, however, the Supreme Court distinguished 'banning' (which is permanent) from 'withdrawal' (which may be temporary). The Minister of Information may therefore withdraw *Tempo*'s license without violating Article 4 of Law No. 21/1984. But the distinction was specious. Evidence showed that a permit that had been withdrawn had never been returned to its original holder, enabling the holder to recommence publication (Millie 1999: 275). In any case, *Tempo*'s permit had been quickly reassigned to another publication controlled by business interests more sympathetic to the government (Dean 1999).

The judiciary is also often complicit in protecting the personal interests of Indonesia's political elites in criminal matters. In 1977, Haris Murtopo, a high school student, shot and killed a fellow student in a fight. The trial court held that Haris had acted in self-defense. In acquitting him of murder, the trial court also accepted that the illegal gun used in the killing belonged to his driver. It just so happened that Haris

¹ In moving to withdraw *Tempo*'s licence, the minister of information had failed to consult the Indonesian Press Council as required by Article 33 of the Regulation and thus had violated his own ministerial regulation.

was the son of General Ali Murtopo, a close associate of Soeharto and chief of the country's secret service. Regardless of the actual facts of the case, it was clear that the Chief Justice of the Supreme Court had personally intervened in the case and had virtually instructed the trial court judge to rule in favor of General Murtopo's son (Pompe 2005: 126-27).²

Many Indonesian judges often seize upon ambiguities in the law to subvert the legal system and use it for purposes for which it was never intended. The Commercial Court, established in 1998 after the fall of the New Order, has gained some notoriety in helping litigants extort money from their adversaries by subverting the country's bankruptcy law. By 2002, the Commercial Court had become largely corrupt and dysfunctional. In the *Manulife* case (2002), for example, the Commercial Court ruled a financially-sound Indonesian subsidiary—PT Asuransi Jiwa Manulife Indonesia (AJMI)—of a Canadian insurance company bankrupt. The bankruptcy petition was filed by a minority shareholder in AJMI who claimed that despite healthy profits, AJMI had failed to pay him dividends. AJMI argued that the company's shareholders had voted not to make dividend payments in 2000 because of the uncertain economic climate that still prevailed in the wake of the Asian financial crisis (Roberts 2002). Hence, the issue was a contracts dispute about whether AJMI was legally bound to make dividend payments regardless of shareholder approval. Thus, the case should have been brought before a district court and not before a bankruptcy forum.

Indonesia's bankruptcy law allows the petitioner to choose a receiver who is then appointed by the court to administer the assets of the bankrupt company. The receiver has broad powers to administer the assets of the debtor without needing to obtain the debtor's consent. This gives the petitioner considerable leverage over the debtor (Sullivan 1999). In *Manulife*, the petitioner had used the bankruptcy law—with the connivance of the Commercial Court—to extort AJMI into paying the dividends the petitioner thought it was owed. The Commercial Court was able to do this because Indonesia's bankruptcy law did not require actual insolvency on the part of the debtor. It was also vague as to when a debt was actually due and payable. The weakness of the bankruptcy legislation left a large loophole through which Commercial Court judges could connive with litigants to distort the intent of the law. Corruption is often al-

² Referencing the personal interview notes of the late Daniel S. Lev (October 30, 1978), Pompe (op. cit.) claimed that a Supreme Court insider close to the Chief Justice had revealed that the Chief Justice had "called the district court judge in the Haris Murtopo murder trial and directly dictated the decision to him by which Haris was freed." (p. 127)

leged in cases such as this. In *Manulife*, AJMI executives claimed that the Commercial Court's ruling had been "bought and paid for" by the petitioner (Roberts 2002).

In the *Prudential* case (2004), the Commercial Court once again declared bankrupt a financially-sound Indonesian subsidiary of a foreign insurance company—British-controlled PT Prudential Life Assurance (Prudential). This time the issue was a consultancy contract that Prudential had terminated for some undisclosed reason. The consultant had claimed damages from a breach of contract and resorted to the Commercial Court to extort Prudential into paying the disputed amount. Once again, the lawsuit should have been brought before a district court instead of the Commercial Court. In both *Manulife* and *Prudential*, the Commercial Court's decisions were eventually overturned by the Supreme Court. In the *Manulife* case, however, it has been argued that the Supreme Court did not act until considerable international pressure had been put on the Indonesian government to do something about the Commercial Court's ruling (Roberts 2002).³

In the four cases briefly described here, it is clear that the Indonesian judiciary protected the interests of the government and individual members of the political elite by breaking the law and procedural rules. The discussion also shows that the judiciary is corrupt and that individual judges can be bought by litigants wishing to manipulate the legal system in furtherance of their own particularistic interests.

B. History and Pattern of Limited Independence

1. The Dutch Colonial Period

It is important to bear in mind that judicial independence in Indonesia has never been absolute throughout the country's history.⁴ During the colonial period, the government interfered extensively in the judicial process, a practice that was to cease only by the middle of the 19th century when the Dutch parliament gained control over the affairs of the Indonesian colonies (Pompe 2005: 16-24). Prior to this point in Indonesia's colonial history, the government retained firm control over the colonial Supreme Court (*Hooggerrechtshof*). The chief justice of the Supreme Court even sat on

³ But see 'Supreme Court Chief Justice Bagir Manan: No Pressure to Revoke Manulife Bankruptcy Ruling', *Tempointeractive*, 10/7/2002 (http://www.tempointeractive.com/hg/nasional/2002/07/10/brk_2002071001.uk.html).

⁴ It may be argued that after *Reformasi*, the judiciary has gained greater independence, but whether it has actually grown into a competing center of political authority capable of checking the power of the executive and legislative branches of government is another issue altogether that will be discussed in Chapter 4.

the Council of the Indies (*Raad van Indië*), a governmental body intended to assist the Governor-General in the administration of the colony (ibid.).

But even after the establishment of Dutch parliamentary control over the colony, the colonial government continued to encroach on the domain of the judiciary. For example, the colonial executive retained “extraordinary rights” to detain or expel from its territory persons thought to pose a threat to the security of the colonies without recourse to the courts. The colonial executive could suspend a judicial proceeding already underway and detain a suspect extra-judicially. The colonial government could even detain a person who had been already released by the courts due to insufficient evidence. But because the colonial executive, during the latter half of the 19th and the first half of the 20th centuries, never actually interfered in the judicial process by dictating verdicts, the colonial Supreme Court remained technically independent. Despite this technical independence, however, the Supreme Court was never allowed to develop into a competing center of political authority that would be strong enough to check the discretionary actions of the colonial executive. The colonial government retained these extraordinary rights well into the 20th century until the end of the colonial period as a hedge against the growing national independence movement (ibid.).

One should note, moreover, that the jurisdiction of the colonial Supreme Court extended mainly over the colony’s European population and those legally considered as Europeans. Under the colonial system of legal pluralism, native Indonesians usually did not have recourse to the Supreme Court. Significant civil and criminal cases involving native Indonesians were brought before the *Landraad*. As there were two other courts reserved for native Indonesians that heard less important matters,⁵ the *Landraad* was considered to be the highest court for non-Europeans. Appeals from this court were heard in the *Raad van Justitie*, the intermediate appellate court for Europeans (Lev 1985: 14-19). Only very rarely would cassation petitions filed by native Indonesians be heard by the *Hooggerichtshof*, the colonial Supreme Court (Pompe 2005: 29).⁶

⁵ The district court for cases involving minor issues and the regency court for cases involving more important legal issues (Lev 1985: 16).

⁶ Review in cassation was restricted to issues based on statutory interpretations. Since most *Landraad* decisions involved interpretations of *adat* or customary law, which were largely unwritten, they were excluded from cassation review. But even *Landraad* decisions involving criminal violations—which were based on statutes—were excluded from the purview of the colonial Supreme Court (Pompe 2005: 29-30).

The most pernicious aspect of this system of judicial apartheid lay in the different procedural codes used in the two separate court structures. For the Europeans, all the legal protections and rights enjoyed by persons living in The Netherlands were incorporated into the colonial civil and criminal codes. Meanwhile, for the native Indonesians, there was only one procedural code followed in both civil and criminal matters—the *Indisch Reglement*, which was amended in 1941 as the *Herziene Indisch Reglement* (HIR). The HIR, the procedural code used in the *Landraad*, afforded far fewer protections to native Indonesians against governmental actions. Thus native Indonesians could be more easily arrested, detained and convicted under the HIR than could Europeans under their own procedural codes (Lev 1985: 17-18).

2. *The Parliamentary Period*

When independence came, both sentiment and practicalities dictated that the new republic adopt the HIR as the procedural code for Indonesian courts over the Dutch codes that would have given Indonesians far better protection and rights against governmental actions. As mentioned above, the HIR was the code used in the *Landraad*, the highest court for Indonesians during the colonial period. As Lev (1985: 29) pointed out, in terms of choosing models for judicial institutions, this gave the *Landraad* “a slight nationalist edge” over Dutch courts which, more importantly, used different procedural codes unfamiliar to most Indonesian judges available to serve in the courts of the newly independent state. The judges in these new courts had for the most part been *Landraad* judges who had been used to applying the HIR throughout their professional career (ibid.). To be sure, the judges could have been retrained, but in the hectic and heady days of the revolutionary struggle against Dutch colonialism—when the survival of the fledgling state was the over-riding consideration—institutional design of the judiciary was not at the top of the political agenda.

Thus it was that the *Landraad* and, more importantly, the HIR—designed more to serve the interest of the government than to restrict its actions against the country’s citizens—became the “genetic pattern of the Indonesian state” (Lev 1985: 13). From its very beginning, the Indonesian judiciary saw itself more as part of the government than protector of ordinary Indonesians against the possible abuses of state power by their own government. Nevertheless, the good training that *Landraad* judges received from the Dutch meant that the courts of the newly independent republic functioned reasonably well given the circumstances (ibid. at 30). But optimism about the prospect

of a *negara hukum*, a state based on the rule of law, was dashed on July 5, 1959—barely nine years after the Dutch officially recognized Indonesian independence on December 27, 1949—when Soekarno, the young republic’s first president, reintroduced the heavily executive-biased 1945 Constitution to the country and ushered in the era of Guided Democracy. What precipitated this change?

3. *Soekarno’s Guided Democracy*

The period from 1949 until 1959 in Indonesia was marked both by an adherence to parliamentary democracy as well as constant social division and pervasive political instability. There were ten successive governments in Indonesia during this ten-year period, one of which—led by Prime Minister Susanto Tirtoprodjo—lasted barely a month from December 20, 1949 until January 21, 1950.⁷ This political instability prevented the government from focusing its efforts into rebuilding the Indonesian economy, left in tatters in the wake of the destruction wrought by the Second World War and the nationalist revolution against Dutch colonial rule (Kingsbury 2005: 44-49). There was thus a perceived need for the introduction of a more effective government. Soekarno, the country’s founding president, argued forcefully for ending the rule of parliamentary democracy and for the reintroduction of the 1945 Constitution, which provided for a very strong executive led by the president. Under the 1945 Constitution, the president would hold both executive and legislative powers. The national parliament would not be abolished but would be relegated a largely consultative role (Nasution 1992: 319-20).

The re-introduction of the 1945 Constitution also gave the army a formal role in the country’s political system. Under the new system, the president could appoint up to 35 members of the armed forces to sit in the national parliament and represent the interests of the armed forces in national debates (ibid. at 321-22). Armed forces participation in Indonesian politics under the new system merely established a formality. It had, in fact, already declared martial law two years previously on March 14, 1957, and laid the groundwork for the introduction of *dwifungsi*, the doctrine ‘dual function’, by which the army justified its participation in the civilian affairs of the state

⁷ The first government of the parliamentary period was led by Prime Minister Mohammad Hatta and lasted from December 20, 1949 until September 6, 1950. The tenth and last government of this period was led by Prime Minister Djuanda and lasted between April 9, 1957 and July 10, 1959. Soekarno took over the government on July 10, 1959 and led the country both as president and prime minister. *Kabinet Indonesia* available at http://www.ghabo.com/gpedia/index.php/KABINET_INDONESIA.

(Kingsbury 2005: 49).⁸ High on the army's political agenda was the control of the judiciary. Starting with the advent of martial law in 1957, the army began pushing for the position of deputy chief judge in all of Indonesia's courts to be filled by military officers (Pompe 2005: 53). According to Daniel Lev, the army had been unable to get the courts to decide cases in a way that it believed they should be decided. Believing that justice was a matter of national security, the army wanted to extend its authority over the judiciary.⁹ Its efforts to control the judiciary in this fashion failed but the army managed to place the Department of Justice under the supervision of the Department of Defense (ibid.). Through this means, the army was able to exercise some control over the administration of the courts, which was under the purview of the Department of Justice.

If the reintroduction of the 1945 Constitution meant the decline of the legislative branch of the Indonesian government under Guided Democracy, it also led to the complete abandonment of the separation of powers doctrine and the subjugation of the judiciary to executive power. President Soekarno delivered a speech to the Provisional People's Consultative Assembly in 1960, formally announcing the abolition of the separation of powers doctrine (ibid. at 52). Earlier, in February of that year, Soekarno had already effectively buried the separation of powers doctrine in practice by asking the chief justice of the Supreme Court, Wirjono Prodjodikoro, to join his cabinet. Wirjono first joined the cabinet as a minister and legal advisor (*penasihat hukum*) while retaining his position as chief justice of the Supreme Court, but by March 6, 1962, his position as chief justice had become a cabinet post and ministerial appointment. At this point, the judiciary had ceased to function as a separate branch of government distinct from the executive.

Symbolically, too, the independence of the judiciary had been compromised when in December 1960, the traditional symbol of justice—the blindfolded lady wielding a sword and a pair of scales—was replaced through ministerial decree signed by Minister of Justice Sahardjo by the banyan tree adorned with the Javanese word *Pengayoman*, meaning “protection and succor” (Lev 1965: 119). Rather than representing impartiality, the banyan tree was “explicitly a paternalistic symbol” (ibid.) and “carries

⁸ According to Kingsbury (op. cit.), the parliamentary period actually ended with the second cabinet led by Prime Minister Sastroamidjojo which fell on March 14, 1957, a date which coincided with the declaration of martial law (p. 49).

⁹ Personal interview notes of Daniel S. Lev, September 1, 1959, quoted in Pompe (2005: 53).

a much more hierarchical, patrimonial, and discretionary connotation” (Pompe 2005: 58 n. 95). Symbolically, then, the judiciary would no longer function as a check on executive power. Instead, it is to be subservient to the interest of the nationalist revolution and of the government.

The assault on the independence of the judiciary continued throughout the first half of the 1960s. In 1961, Minister of Justice Astrawinata introduced the concept of ‘guided judiciary’ to an audience of judges. Henceforth, the political goals of the revolution and of Guided Democracy were to override standard jurisprudential rules in deciding cases. Instead, judges were to hold the interests of the government and the nationalist revolution as the appropriate standard to use in rendering their verdicts. This message was to be reinforced repeatedly in the course of the following year (ibid. at 59, n. 98). Implied in the message, of course, was that the separation of powers doctrine was dead and that the judiciary was no longer independent but had become a part of the government. In March 1963, by ministerial decree signed by Minister of Justice Astrawinata, judges were forced to abandon their black robes and compelled to wear military-style uniforms then worn by all civil servants. This move was to reinforce the message that judges were part of the civil service rather than members of a separate state institution.

Finally, in 1964, the government enacted Law No. 19/1964 which, Lev (1978: 226) argued, “completed the formal patrimonialization of Guided Democracy”. Article 19 of the law stated that the government could interfere in any judicial process at any time to protect “revolutionary interests, the state or national honor, or pressing public interest” (Pompe 2005: 52). The law announced boldly through legislation what the government had already been doing throughout most of the period of Guided Democracy as the *Cosmas* case (1962) had shown. In the *Cosmas* case, the chief justice of the Supreme Court, Wirjono Prodjodikoro, had pressured a trial judge to have a smuggling offense treated as a subversion case so that the death penalty could be imposed. The trial judge demurred and said that she would only be willing to do so upon the express instruction of the president. Never expecting the president to be so bold, she was completely taken aback when Wirjono, in the course of the following day, produced exactly what she had asked for (Pompe 2005: 61-62). Thus, executive interference had taken place long before the passage of Law No. 19/1964. In case Law No. 19/1964 had failed to deliver the message, the government passed Law No. 13/1965 (on how the civil judiciary and the Supreme Court was to be organized) the

following year. Article 23 of the 1965 law reiterated the message articulated in Article 19 of the 1964 law and went on to state in the Act's formal elucidation that "[t]he concept that judges shall be impartial, independent from any external interference can no longer be upheld and has been buried" (Pompe 2005: 52).

With the passage of these two laws, the independence of the Indonesian judiciary during the period of Guided Democracy was not only, limited but also effectively destroyed. The downfall of Guided Democracy in 1965 eventually led to the repeal of these two laws.¹⁰ But what replaced them—Law No. 14/1970—would provide no greater independence for the judiciary except in theory. Law and legal institutions, including the judiciary, were unimportant to Guided Democracy. The Indonesian government of that period made no bones about demonstrating their low regard for the judiciary.

In many respects, the government during Guided Democracy had gone too far in the subjugation of the judiciary. At the end, this had caused a backlash in popular sentiment and a loss in political legitimacy for the regime. This much was evident to the New Order regime that followed. To gain political legitimacy, the government under the New Order had at least to be seen to favor the re-introduction of the *negara hukum* and the restoration of the independence of the judiciary. Thus, Law No. 14/1970 provided for the separation of the judiciary from the government. But in practice, the emasculation of the Indonesian judiciary had already begun by the time of the law's passage. The effect of the New Order for the judiciary would turn out to be even more devastating than Guided Democracy. If the latter had resulted in the loss of independence, the three decades of the New Order were to result in the almost complete dysfunctionality of the judicial system.

4. Soeharto's New Order

Under the New Order, Soeharto sought ideological justification for his regime's particular political style. During its early days, the appearance of legality was important to the regime. It distanced Soeharto's rule from that of Soekarno, who had shown such disdain for legal process. A great part of Soeharto's support during this period came from lawyers and intellectuals who detested the lawlessness of Soekarno's Guided Democracy and wanted a return to the rule of law and constitutionalism

¹⁰ The downfall of Guided Democracy and the subsequent emergence of the New Order are discussed in detail in chapter 4.

(Bourchier 1996: 162-63). By adhering to the rhetoric of legality, Soeharto also hoped to seek legitimacy for his destruction of the PKI¹¹—the Indonesian Communist Party—which involved mass violence. An estimated 500,000 to one million people died in the New Order campaign to rid Indonesia of the communists.¹² One example of his efforts in this regard was the creation of the Mahmillub—*Mahkamah Militer Luar Biasa* or Extraordinary Military Tribunal—before which many members of the PKI were tried. The strategy worked. Despite the massacres, many Soeharto supporters who wanted a return to the rule of law and constitutionalism took the Mahmillub as an example of the New Order’s commitment to legal process (ibid.).

But Soeharto did not want to set up a democratic, constitutional republic. He wanted a strong authoritarian state. To help him give this state a ‘constitutional’ basis, Soeharto turned to a group of military lawyers, among them Lt. Col. Ali Said whom Soeharto was later to appoint Chief Justice of the Supreme Court, and an older generation of *adat* or customary law scholars. This group appropriated the Pancasila, an ideological symbol created by President Soekarno, and infused it with organicist ideas that Raden Soepomo, an *adat* law scholar trained at Leiden University in The Netherlands and one of the chief drafters of the 1945 Constitution, had two decades earlier argued should form the philosophical basis of the Indonesian state.

Soepomo argued that neither liberalism, with its emphasis on the individual, nor socialism/communism, with its emphasis on the class struggle, was an appropriate *Staatsidee* for Indonesia. Neither sat well, he claimed, with traditional Indonesian society where ruler and his people relate to one another in the same way that a father and his family members live together—through trust and mutual cooperation. Moreover, there are no conflicting interests between a father and his family members. The family is an organic whole working towards the same ends. This “family principle” (*asas kekeluargaan*) is entirely consistent, he argued, with such common Indonesian cultural precepts as “mutual assistance” (*gotong royong*) and “deliberation and consensus” (*musyawarah dan mufakat*). Traditionally, communal problems were tackled through *gotong royong* and decisions were made through *musyawarah dan mufakat*, rather than on the basis of majority rule. The Indonesian constitution, and by extension its form of

¹¹ *Partai Komunis Indonesia*.

¹² According to the official Indonesian version of events that occurred in October 1965, the PKI was involved in an effort to overthrow President Soekarno’s government. This version has been contested. See Anderson & McVey (1971) and Roosa (2006).

government, must embody this family principle with its emphasis on unity, hierarchy, and mutual cooperation in order to be authentically Indonesian (Nasution 1992: 92-93).

Soepomo argued for the introduction of what he called the ‘integralistic’ state as the proper way to govern Indonesia. Such a state would reflect “the unity of life, the unity of servant and master (*Manunggaling kawulo lan gusti*), . . . and between the people and its leaders” (ibid. at 92). His two examples of this ideal state were Nazi Germany and Imperial Japan. He argued that the Nazis’ emphasis on the political unity of the people and the leadership principle was consistent with the Asian way of thinking. Likewise, the Japanese embrace of the family principle and the unity of the Emperor, the state, and the people was a good model upon which to base the Indonesian *Staatsidee* (ibid. at 91-92). It was this *Staatsidee* that should guide the drafting of the Indonesian constitution.

Several corollaries naturally flow from Soepomo’s vision of the ideal Indonesian state. First, there is no distinction between state and society. As Nasution pointed out, in Soepomo’s vision, the state “is nothing other than society regulated, kept in order, governed or controlled” (ibid. at 93). But since this state embodies the family principle, there is no concern about the abuse of power by government officials. It simply will not happen. The state will always act in the best interest of the people. Therefore putting limits on the power of the state would accomplish nothing except to hamper the government in the execution of its duties. According to Soepomo’s philosophy, therefore, the Indonesian constitution need not incorporate the separation of powers doctrine. Second, the constitution need not guarantee political or human rights for individuals because, as Soepomo himself said, “individuals are nothing else than organic parts of the state, having specific positions and duties to realize the grandeur of the state and, on the other side, because the state is not a powerful body or political giant standing outside the sphere of individual freedom” (quoted in ibid. at 93). Third, the system of government proposed by Soepomo necessarily meant the rejection of democratic values. To him, all that mattered was the quality of leadership. The head of state, whether he be a king or a president, “must spiritually unite with the whole people” and must possess “the quality of the Just King (*Ratu Adil*)” (quoted in ibid. at 95-96). With these qualities in the country’s leader, there would be no need for elections, a system of checks and balances or human rights.

The philosophy of government of the type that Soepomo expounded was subsequently “nurtured” in the Military Law Academy (*Akademi Hukum Militer*—AHM) and Military Law College (*Perguruan Tinggi Hukum Militer*—PTHM)¹³ where many *adat* law scholars, to whom Soeharto would subsequently turn for help, taught (Bourchier 1996: 151). As scholars of *adat* or customary law, they were naturally attracted to the notion that a nation’s laws emanated from the cultural traditions or customs of its people. Ironically, in this regard they were heavily influenced by German romanticism and the Historical School of Law founded by Friedrich Karl von Savigny via Cornelis van Vollenhoven, an *adat* law scholar at Leiden University. Adhering to the romantic view, the Historical School saw “the nation state as an entity possessing an organic unity above and beyond the concerns of individuals” (Bourchier 1999b: 187). This romantic view—that law comes naturally from a people’s cultural tradition and that the nation state is best understood as an organic entity—eventually lost favor in Europe where it was largely displaced by legal positivism. Van Vollenhoven, finding no receptive audience in Europe, went east to the Netherlands Indies in the opening years of the 20th century, where he argued successfully for the Dutch colonial government to retain the existing race-based legal pluralism. It would be unjust, van Vollenhoven claimed, for the Dutch to impose European laws upon traditional Indonesian society with its totally different legal concepts and ways of resolving disputes. No doubt because his views gave ideological coherence to a system of power designed for the efficient exploitation of the native population, they were widely accepted in the colonies. Thus it was that, as Bourchier noted, Savigny’s romantic views of law was to have their “enduring impact in Indonesia” (ibid. at 188-89).

Steeped as they were in this academic tradition, Soeharto’s military lawyers readily applied organicist ideas developed by Soepomo to the constitutional design of the New Order. Soekarno’s Pancasila was quickly emptied of its left-leaning and revolutionary overtones and refilled with politically reactionary tenets drawn largely from Soepomo’s notion of the integralistic state. Pancasila was a convenient ideological symbol familiar to most Indonesians. Its appropriation and reinterpretation therefore provided both a break from Soekarno’s Guided Democracy and a continuity of the state’s authority. Under this Pancasila Democracy, the judiciary was to aid in the implementation of state policy. Its task was not to check the power of the government as

¹³ Military lawyers were trained at these two institutions. The Military Law College awarded law degrees equivalent to those awarded by civilian universities.

prescribed by the separation of powers doctrine. Instead, as Col. Abdulkadir Besar, one of Soeharto's military lawyers—and a graduate of both the AHM and PTHM—argued, because the 1945 Constitution was based on the family principle, a more appropriate notion for understanding the role of the judiciary in Indonesia was to look at it as a “division of powers” (Besar 1972: 493-501). Law No. 14/1970 can claim that the judiciary in Indonesia is independent but, as Jayasuriya (1999: 191) pointed out, “[i]ndependence within this framework, implies the independence to carry out judicial functions within the context of a dominant state ideology.” In this way, the judiciary in Indonesia is nothing more than a “policy-implementing” institution (*ibid.*). Despite its genuine philosophical antecedent, one can cynically, but perhaps realistically, say that the notion of an integralistic state is merely an ideological rationalization for a raw system of power, which requires the subjugation of the judiciary for its survival.

C. A Judiciary Under Siege

1. Abuse of the System of Dual Court Administration

By dint of its colonization by the Dutch, Indonesia inherited a civil law system that prevailed in The Netherlands. During the Napoleonic Wars, The Netherlands were occupied by the French, first as a vassal state under Napoleon's brother Louis, who was crowned as the King of Holland, and subsequently as an integral part of the French empire. The French occupation of The Netherlands ended only in 1813 with the defeat of Napoleon, about 18 years after the French first invaded in 1795. Not surprisingly, French ideas became influential in The Netherlands, not least of which was the French conception of the architecture of the state (Pompe 2005: 12-16). The French favored “a highly rationalized state organization based on ‘an extreme form of division of labor, in which each unit did do and could do only one thing’” (*ibid.* at 13, quoting Shapiro 1981: 31). This division of labor became known as the ‘separation of powers’ doctrine. Under this doctrine, each branch of government—executive, legislative or the judiciary—is separate and independent of each other. One branch does not provide a ‘check’ or ‘balance’ against another as in the ‘balance of powers’ system that exists in the United States.

The separation of powers doctrine has a special consequence with respect to the administration of the judiciary. Since the system is premised on “an extreme form of division of labor”, the administrative side of the judiciary—e.g., finances, personnel and just simple office management—had to be done by the executive branch. The ju-

diciary itself was to be responsible exclusively with dispute settlement. With regards to this aspect of the work of the courts, the judiciary was to have the final say, but it was to leave all of the administrative aspects of the courts to the government through the minister of justice. But part of the reason for this arrangement also had a great deal to do with the issue of public accountability since administration of the courts involved the use of public funds. It was incumbent upon political appointees, such as the minister of justice, to account to the public as to how its money was being spent. In a democracy, the government had to account for its use of public funds to the legislators, who act as representatives of the people. Because the judiciary was supposed to be independent of the other branches of government, it was argued that it could not possibly be held to account for its actions by the legislature (Pompe 2005: 12-13).

As Pompe (2005: 70) pointed out, this arrangement works well in countries where the political conditions are ‘balanced’ as in The Netherlands. During the colonial period, it worked well in Indonesia too because the Department of Justice (DOJ) remained politically neutral and restricted its role exclusively to the administration of the courts (ibid. at 114). It would acquiesce to the requests made by the judiciary relating to finances, personnel or just plain office management. Obviously, in less ‘balanced’ political environments, this system of dual administration of the judiciary can be easily abused. During Guided Democracy, the government began to move judges to suit its own political agenda rather than the needs of the judiciary (ibid. at 60). But a pattern of abuse only began to emerge during the New Order with the appointment of Oemar Seno Adji as minister of justice. It was during Seno Adji’s watch that the emasculation of the Indonesian judiciary began in earnest. Ironically, it was the liberal proponents of the *negara hukum* who first recommended Seno Adji for the post to Soeharto. Adnan Buyung Nasution, a well-known human rights lawyer and founder of the Indonesian Legal Aid Society (LBH),¹⁴ said that Seno Adji had been “one of them” —a progressive thinker who could be counted on to help bring back the rule of law to Indonesia.¹⁵ The liberals were soon to be proved wrong.

The DOJ was supposed to work in tandem with the Supreme Court on personnel management. Under the Indonesian system, judges typically join the judiciary straight out of law school and, for the most part, remain within the judiciary throughout their professional careers. These ‘career’ judges develop professionally through a

¹⁴ *Lembaga Bantuan Hukum*.

¹⁵ Personal interview, November 6, 2007.

series of appointments that would take them to courts in many parts of the Indonesian archipelago. Typically, judges begin their career by doing administrative tasks in district courts, sometimes by serving as court clerks (*panitera pengadilan*), during which time they are supposed to learn the basic skills of their profession. After a suitable period of on-the-job training—typically two years—these judges are then posted to different district courts where they will begin hearing and deciding cases (Ali Budiardjo 1997: 150-51).

Their first appointment as full-fledged judges would be to one of the less important district courts. In Indonesia, district and appellate courts are ranked in the order of their importance measured by the size of the population centers they serve and the complexity of the legal issues that are typically heard in those courts. Thus, a district court in one of the provincial cities would be considered less important than a district court in Jakarta, the country's capital city and so on. After serving in a less important district court, a judge would then be transferred to a more important district court. In addition to transfers, judges also advance through promotions up the career ladder that could conceivably end at the Supreme Court (*ibid.*).

Transfers and promotions should be based upon the performance of the individual judges. The more gifted or dedicated the judge, the more quickly should he/she climb the career ladder. Logically, more senior judges are in the best position to assess the performance of their more junior colleagues. For this reason, decisions relating to promotions and transfers should originate within the judiciary and, through the Supreme Court, be conveyed to the DOJ, which would see to it that these decisions are implemented. That is the theory, at least, and in politically 'balanced' jurisdictions, it is also probably the practise. But in Indonesia under the New Order, this dual administration of judicial personnel was quickly abused for political gains.

The DOJ under Seno Adji quickly usurped the judicial appointment process by cutting the Supreme Court out of the loop. At first, Seno Adji simply ignored the Supreme Court's request for transfers and promotions (Pompe 2005: 115). But in 1971, Seno Adji went a step further and formalized the procedure through a ministerial decree that boldly stated that it was the DOJ, not the Supreme Court, that had the final word on personnel management as it concerned the transfers and promotions of judges (*ibid.* at 116). As Pompe (*ibid.*) pointed out, this maneuver actually violated Law No. 14/1970, which guaranteed the independence of the judiciary. Seno Adji justified his move by arguing that since judges were also civil servants, he was simply regulating

their civil servant status (ibid.)¹⁶—something in his capacity as minister of justice he was arguably entitled to do. It was a clever legal legerdemain that left the system of dual judicial administration in ruins. Thereafter Seno Adji could transfer, promote, demote, and otherwise discipline and dismiss judges according to his whim or as political exigencies dictated. Seno Adji's maneuvering gave the New Order government effective political control over the judiciary.

The power to control a judge's career development gave the government significant leverage with which to control judicial behavior. A 'wrong' decision in a politically sensitive case could send a judge's career into a tailspin or insure that his next posting would be in a remote part of the archipelago. Benyamin Mangkoedilaga, a trial judge at the Jakarta Administrative Court, quickly found himself in Medan, a provincial city in northern Sumatra, after declaring that the government's action was illegal in withdrawing *Tempo* magazine's publishing permit in the 1996 case discussed above.¹⁷ This type of punitive transfers still occur today in post-New Order Indonesia. Sahlan Said, a trial judge in Yogyakarta, found himself 'promoted' to an appellate court in Kendari, a small town in Sulawesi, for speaking out against the 'judicial mafia'.¹⁸ Of course, these punitive transfers provided judges with a great deal of incentive to come up with the 'correct' decision in politically sensitive cases. Muladi, a former minister of justice, confirmed that judges were typically scared of the DOJ.¹⁹

The politicization of judicial transfers and promotions obviously had dire consequences for the competence of the judiciary. Lacking the ability to assess the performance of individual judges, the DOJ quickly abandoned quality assessments in deciding who gets promoted and who gets transferred where. When the Supreme Court still had a say in deciding promotions and transfers, there was a system of *eksaminasi* in place. This is a system by which a judge's decisions are examined by senior judges in order to determine his/ her competence. It not only helped root out incompetent judges but also helped those judges who were willing to learn profit from critiques of

¹⁶ By 1974, lower court judges had officially become part of the civil service (Law No. 8/1974). This law compelled judges to join Korpri (the Indonesian Corps of Civil Servants) and they had to swear allegiance to the principle of *monoloyalitas* "which calls upon all civil servants to support the government." (Pompe 2005: 129)

¹⁷ Pompe (2005: 166 n. 202) pointed out that Medan was not severe as far as punitive transfers went.

¹⁸ 'Sahlan Fights Against "Court Mafia"', *Jakarta Post*, October 21, 2003.

¹⁹ Personal interview, November 8, 2007. Prof. Muladi served as minister of justice under President Soeharto for only three months before the Asian financial crisis and the fall of the New Order. He explained that he personally never intimidated judges.

their decisions to sharpen their judicial skills (Pompe 2005: 119-20). The abandonment of *eksaminasi* obviously has led to a decline in competence and professionalism among Indonesian judges. In deciding cases, a judge can afford to be careless in his/her work because he/she no longer had to worry about whether he/she had made the correct legal analysis or applied the appropriate standards to the facts. Indeed, judges can even reach out to the litigants in a dispute and sell their verdict to the highest bidder (Ali Budiardjo 1997: 151). What mattered to litigants was the judge's conclusions—the verdict; how the conclusions were reached was irrelevant not only to the litigants but also to the judge and the DOJ. To replace the system of quality control that was in place, Seno Adji developed a system of patronage in transfers and promotions when he was minister of justice: “Judges who are liked by and loyal to the minister of justice are placed in attractive positions, while those who fall out of favor are banished to the wilderness” (Pompe 2005: 120). This practice became known as the ‘like-dislike’ system (ibid.).

2. *Politicization of the Supreme Court Leadership*

As the New Order consolidated its hold on Indonesia, political control over the judiciary became ever tighter. The politicization of the judiciary through DOJ control over the promotions and transfers of judges had given the government a great deal of leverage over how judges decided cases that were politically sensitive. The government was soon to increase its control over the judiciary by infiltrating men who had proven themselves loyal to the regime into the position of chief justice of the Supreme Court. Oemar Seno Adji became the first of these men when he was appointed in 1974. Seno Adji's maneuverings while he was minister of justice helped to create the conditions that would make it possible for the government to appoint an outsider to become chief justice of the Supreme Court. Prior to the New Order, no outsider had been appointed to the Supreme Court (ibid. at 352). Thus, Seno Adji's appointment was a trendsetter. Two more political appointees to the leadership of the Supreme Court were to follow. After Seno Adji stepped down from the bench in 1981, he was replaced by Mudjono, a retired army general. Like Seno Adji, Mudjono had been minister of justice before he was appointed as chief justice. When he died in 1984, Mudjono was succeeded by Ali Said who was also a retired army general and had served as minister of justice prior to his appointment as chief justice. These three men were the classic examples of what Pompe (ibid. at 403) called “strong” chief justices

who were appointed from outside the ranks of the judiciary and who could be counted on to enforce the government line or protect the interest of the political elites. Seno Adji, for example, had interfered in a murder trial proceeding to assure the acquittal of Haris Murtopo, son of General Ali Murtopo, a prominent political figure in the early days of the New Order, as discussed above.

Although the three political appointments, starting with Seno Adji, gave the government a great deal of control over the Supreme Court, there was concern that it may have opened the door to future political appointments that might not be quite so willing to do its bidding. It therefore worked to insure that the national parliament was cut out of the appointments process even though, in practise, the latter had hardly ever exercised its right to participate in the recruitment of Supreme Court justices. To accomplish its goal, the government succeeded in passing Law No. 14/1985 on the Supreme Court, which practically limited the recruitment of Supreme Court justices to the career judiciary. Pursuant to this law, Purwoto Gandasubrata, a career judge, succeeded Ali Said as chief justice in 1992. The government's strategy proved successful. Purwoto subsequently proved himself to be just as 'accommodating' (ibid.) of the government's interests as his non-career predecessors in the *Kedung Ombo* case (1992).

The case concerned a World Bank-funded project to build a dam on the Serang River in Central Java near the city of Semarang. The project was supposed to provide hydro-electric power as well as irrigation to a large number of local farms. Unfortunately, the project also entailed the resettlement of some 5,268 families from 20 villages.²⁰ The governor of the province in which the dam was to be constructed offered the displaced families Rp. 250 per square meter of land that had been used for housing and Rp. 300 per square meter of farmland. In addition, the displaced families were later offered relocation.

But the families complained that the land offered to them was not fit for cultivation and extremely difficult, if not impossible, to access by road. In addition, there was no source of potable water on the land (McCully 1995). Dissatisfied with the compensation offered, a small number of affected families decided to sue the government, demanding Rp. 10,000 per square meter (Aditjondro 1998a: 41). The district court in Semarang dismissed the lawsuit and the appellate court affirmed. The case went up to the Supreme Court where Justice Asikin Kusumah Atmadja not only found

²⁰ 'Indonesian Dam—World Bank Project Displacing Indigenous Peoples', *InterPress Service*, November 8, 1994, available at <http://forests.org/archive/indomalay/indodam.htm>.

for the plaintiffs but also awarded compensation of Rp. 50,000 per square meter of land used for housing and Rp. 30,000 per square meter of agricultural land, which came to a total of Rp. 9 billion (about US\$4.5 million) (ibid.). The amount awarded was supposed to reflect the ‘immaterial damages’ that the plaintiffs had suffered (Pompe 2005: 150). Although the decision had been rendered in July 2003, it was not announced until a year later, two days before Justice Kusumah Atmadja retired from the bench (Aditjondro 1998a: 41).

Naturally, the decision was not well received by the government. Aditjondro (ibid. at 34-35) pointed out that dam construction was important to the cement industry in Indonesia as well as to a number of construction companies related to the Department of Public Works. Indeed, the cement industry “acted as a major impetus for building large dams” (ibid. at 34). Many of Soeharto’s family members and cronies were active participants in the cement industry. For example, Indocement, a large cement producer, is controlled by the Salim Group—owned by Liem Sioe Liong, a top crony—in conjunction with Sudwikatmono, Soeharto’s cousin, Tutut Soeharto, his eldest daughter, and Sigit Harjojudanto, his eldest son. Another large cement producer, Semen Cibinong, is controlled by Hashim Djojohadikusumo, a brother of Lt. General Prabowo Subianto who was married to Titiek Soeharto, one of the President’s younger daughters (ibid. at 35).

Pressure was immediately put upon the Supreme Court to review its decision. Soeharto summoned Chief Justice Purwoto Gandasubrata to the national palace and told him that Justice Asikin Kusuma Atmadja’s decision in the case had been unjust (Pompe 2005: 151). “In the Indonesian context,” Pompe (ibid.) pointed out, “there was no mistaking this statement: it was an executive directive to Purwoto demanding that the first Kedung Ombo decision be overturned in review.” In 1994, a Supreme Court panel led by the Chief Justice himself reversed the Kusumah Atmadja decision on the grounds that the court cannot award compensation that is greater than what had been claimed by the plaintiff. There were two problems with this second Supreme Court decision in *Kedung Ombo*. Abdul Hakim Garuda Nusantara, one of the lawyers who had represented the Kedung Ombo families, said that a review could only be justified if new evidence had surfaced that would have been material had it been known at

the time of the first decision.²¹ In the *Kedung Ombo* case, no such new evidence had been presented. Pompe (ibid. at 152) also pointed out that there had been ample precedent of courts awarding damages greater than what the plaintiffs had demanded going back to the 1970s. Moreover, in 1996, the Supreme Court upheld, in the *Small Credits* case, the precedent that a court could award damages greater than what had been claimed by the plaintiff (ibid.). Thus, there were no legal grounds for overturning the decision.

Things became even worse with Soerjono, Gandasubrata's successor, who gained some notoriety by issuing 'magic memos' (*surat sakti*), which summarily reversed court decisions, even those of the Supreme Court itself (Bourchier 1999a). A notorious example of Soerjono's magic memos was the *Hanoch Hebe Ohee* case (1995), which involved government appropriation of traditional lands in Irian Jaya (West Papua). After the Supreme Court had awarded compensation to the plaintiff, Soerjono simply stopped the compensation from being paid by memorandum (Bourchier 1999a).

The *Muchtar Pakpahan* case (1996) is also illustrative in this respect. An abundant supply of cheap labor was one of the attributes that many foreign investors found attractive about Indonesia. In 1996, the minimum wage in Jakarta was Rp. 5,200 (about US\$0.25) per day (Samydorai 2001). To keep workers from organizing themselves into trade unions, the Indonesian government had employed a corporatist strategy to start a government-controlled trade union. Established in 1973, this government-controlled trade union underwent several reorganizations to make it more amenable to state control, and was eventually renamed the FSPSI²² (Federation of All-Indonesia Workers' Union). Throughout the 1980s, it was used mainly in assisting the regime's security apparatus to deal with developments that could disrupt the availability of cheap labor (Hadiz 2001: 113). Despite all the government's efforts to channel workers' demands and grievances through FSPSI, workers began to organize themselves into independent trade unions in the 1990s (ibid.). Among these independent trade unions was the SBSI²³ (Indonesian Prosperity Trade Union) led by Muchtar Pak-

²¹ 'Indonesian Dam—World Bank Project Displacing Indigenous Peoples', *InterPress Service*, November 8, 1994, available at <http://forests.org/archive/indomalay/indodam.htm>.

²² *Federasi Serikat Pekerja Seluruh Indonesia*.

²³ *Serikat Buruh Sejahtera Indonesia*.

pahan. In 1993, a year after it was established, the SBSI was officially banned by the government (Samyodrai 2001).

On April 15, 1994, there was widespread labor unrest in Medan where workers went on strike and demonstrated (ibid.). Pakpahan, along with a number of other labor leaders, were arrested for ‘inciting’ the unrest. He was subsequently tried, convicted and sentenced to three years in prison. This sentence was increased to four years upon appeal (ibid.). In September 1995, Pakpahan appealed to the Supreme Court where his case was heard by Justice Adi Andoyo Soetjipto. At the Supreme Court, Justice Soetjipto cleared Pakpahan of all charges and set him free (Pompe 2005: 164). Like the *Kedung Ombo* case, the case against Muchtar Pakpahan “was a traditional standoff between well-connected entrepreneurs and the disenfranchised” (ibid.). Like the *Kedung Ombo* case, therefore, the *Muchtar Pakpahan* case also could not be allowed to stand. The Supreme Court under Chief Justice Soerjono took the unusual step of allowing the prosecutor to petition for a review of the *Muchtar Pakpahan* case. On October 25, 1996, Soerjono accepted the prosecutor’s petition and reversed Soetjipto’s decision, sending Muchtar Pakpahan back to prison to serve out the remainder of his four-year sentence. The Indonesian Criminal Procedure Code is silent on whether the prosecution can petition for review in a case where a criminal defendant has been exonerated by the Supreme Court. Pompe (ibid.) argued that the absence of a provision regulating the prosecution’s right to petition for a review in such cases strongly suggests that the right to petition for review of a Supreme Court decision is reserved for the criminal defendant.

Justice Soetjipto (2000: 271) argued more strongly that the prosecution has no such right.²⁴ He later related that he strongly suspected, but could not prove, that Soeharto had instructed Soerjono to accept the prosecution’s petition and send Pakpahan back to prison. But as he himself later stated, “the Supreme Court clearly broke the law in reviewing the case, which strongly suggests that there was an invisible hand at play” (ibid.). It is clear that the New Order government strongly disfavored independent trade unions whose activities, if unchecked, could make Indonesia less attrac-

²⁴ Ironically, the Supreme Court recently accepted a similar petition from the prosecution to review the case of Pollycarpus Budihari Priyanto who had earlier been exonerated by the Supreme Court in the murder of Munir Said Thalib, the prominent Indonesian human rights activist who died of arsenic poisoning on a flight from Jakarta to Amsterdam. Pollycarpus is now serving a 20-year sentence after the Supreme Court reversed his exoneration upon review.

tive to investors. Seen from this perspective, Muchtar Pakpahan was certainly a threat to the security of the New Order regime.

3. *From Politicization to Corruption*

A disastrous consequence of the politicization of the judiciary was the pattern of corruption among judges that was beginning to emerge during the early 1970s. Corruption had appeared in the courts prior to this period but those cases were isolated occurrences that did not add up to a trend or pattern.²⁵ The ‘like-dislike’ system for judicial promotions and transfers that Seno Adji established obviously had no objective criteria for decision-making. Not surprisingly, money began to creep into the system. Judges wanting to be promoted or assigned to ‘wet’ jurisdictions²⁶ would offer ‘gifts’ to the persons in charge of effecting promotions or transfers in return for a favorable decision. In order to do this, judges typically borrow the money or dig into their personal savings. As such, the money spent is considered as an ‘investment’. The judge will then seek a ‘return’ on his investment by accepting or even soliciting bribes from litigants (Reksodiputro 2002: 37). This practise of bribing one’s way into a ‘wet’ jurisdiction has apparently persisted into the post-New Order period. Sahlan Said (2003: 3), a former Yogyakarta district court judge, described this as the S3 system, for *sowan*, *sungkem* and *sajen*. According to Judge Sahlan, if a judge wants to be assigned to a ‘wet’ jurisdiction, he has to visit (*sowan*) the official empowered to make the decision in Jakarta. During the visit, the applicant judge has to ‘pay homage’ to the official (*sungkem*) and tell him where he wished to be assigned while, at the same time, offering the official a gift (*sajen*).

Of course, once a judge has been assigned to a ‘wet’ jurisdiction, he must insure that a percentage of his take goes to his superiors, not only in the DOJ, but also in the Supreme Court that had helped to put him there. Failure to generate this income for his superiors will result in his being transferred to other less ‘wet’ or even ‘dry’ jurisdictions (Pompe 2005: 125 n. 39). Pompe (ibid. at 125) has described this system as consisting of “elaborate financial networks that linked junior judges, as clients, with

²⁵ Zain Badjeber, a former judge and member of the DPR (national parliament) said that judicial corruption became widespread (*menjadi sorotan masyarakat*) after the oil boom in 1974. Before that point, judicial corruption existed only in isolated cases (Personal interview, November 16 & 21, 2007).

²⁶ Judicial districts in Indonesia are often characterized as ‘dry’ (*kering*) or ‘wet’ (*basah*) to denote the jurisdiction’s rent-seeking potential. A ‘wet’ judicial district is one which offers many rent-seeking opportunities while a ‘dry’ jurisdiction is one where the prospect of corruption is minimal.

their decision-making patrons in the Department of Justice and, increasingly, the Supreme Court.” This system is not restricted to promotions and transfers but also prevails with respect to judicial recruitment. Although candidate judges have to undergo an examination in order to be considered for entry into the judicial corps, the final decision is not made on the basis of how well the candidate judges do on their exams but by what they are prepared to pay members of the selection committee. Thus, even novitiates to the judiciary have already made an ‘investment’ in their professional career from which they, of course, expect a ‘return’ that would not only allow them to recoup their money but also assure them of a steady source of unofficial income throughout their career (Reksodiputro 2002: 36).

Corruption is prevalent not only among district court judges. During Mudjono’s tenure as chief justice, candidates had begun to ‘buy’ their way onto the Supreme Court. Nepotism was also rife in Supreme Court appointments. The government’s action in insuring that it gained complete control over the appointments process through Law No. 14/1985 also meant that there was very little, if any, public scrutiny over who got appointed to the Supreme Court. In one case, a judge who had been dismissed for corruption had not only eventually found his way back into the judiciary but also managed to get himself appointed to the Supreme Court (Pompe 2005: 371).

It was no surprise, therefore, that in the *Gandhi Memorial School* case (1996), corruption was alleged at the Supreme Court. The case involved two Indian private schools in Jakarta over which the ownership and control was in dispute. A district court found that one of the parties—Ram Gulumal—had forged legal documents. The court sentenced Gulumal to a prison term, which was affirmed on appeal. But, on cassation, the Supreme Court reversed the conviction and cleared Gulumal of all charges (Bourchier 1999a: 247). Gulumal’s lawyer was alleged to have bribed his friend, Justice Samsedin Aboebakar, and several other Supreme Court justices up to Rp 1.4 billion who then colluded to insure that Aboebakar would chair the panel hearing the case. Aboebakar subsequently rendered a decision favorable to his friend’s client (Pompe 2005: 160-61).

The Supreme Court’s reaction to the scandal probably did more to arouse suspicions of corruption than any actual evidence of malfeasance. Under the leadership of Chief Justice Soerjono, the Supreme Court made every effort to cover up the scandal. Soerjono tried to discredit Adi Andoyo Soetjipto, a Supreme Court justice who demanded a public investigation into the corruption allegation. Instead of agreeing to

Soetjipto's demand for a public inquiry, Soerjono imposed a gag order upon him and carried out an internal investigation whose findings were never made public except to say that there was no evidence of corruption. Soerjono even went so far as to try to seek Soetjipto's dismissal from the judiciary (ibid.).

This ingrained pattern of corruption within the judiciary is one of the most enduring legacies of the New Order regime. But corruption was really just a consequence of the regime's attempt to control the judiciary to suit its own purpose. As we shall see below, political control over the judiciary and its emasculation through rampant corruption not only served the regime's interest but was actually essential to its survival.

II. Patrimonialism: Power and Politics in Indonesia

In a country where the state is an active participant in the economy, large fortunes can be made as a result of the business opportunities that the state makes available to private citizens. In the so-called 'developmental states' like South Korea and Taiwan, the government often chooses national champions to spearhead the country's industrialization efforts. Many brand names that have become familiar to consumers worldwide, such as Daewoo and Hyundai, owe much of their success to the efforts their governments have made on their behalf. Often, these efforts include giving them protection against foreign competition in their home markets by imposing import quotas and erecting tariff barriers or even giving them outright monopolies (Wade 1992; Amsden 1992). In the South Korean context, these national champions were chosen according to more or less objective criteria and had to adhere to strict performance standards.

In Indonesia, something similar took place, but companies were chosen not because they had a track record of success or had a special expertise. They were chosen because of their familial or social ties to Soeharto. In many cases, these business opportunities were often squandered. In others, money was made in great abundance but almost always at the expense of the state and, ultimately, of ordinary Indonesians. No objective criteria were ever used nor performance standards imposed. What business opportunity went to whom depended entirely upon the discretion of the president and a number of his ministers. In this context, there is no room for an honest, competent and independent judiciary which could check the discretionary power of the government.

Politics or how power is exercised and maintained in Indonesia under the New Order have been the subject of a number of theories (MacIntyre 1990: 6-21). But a common theme apparent in many of these theories is the patrimonial nature of the interaction between the state and society. Specifically, power is exercised by the patron in favor of his client who, then, owes a debt of political loyalty to his patron. This political loyalty is obviously crucial to the maintenance of the patron's power. Although the exact nature of Indonesian politics under the New Order is obviously more complex than this, the patrimonial model of state-society interactions is nevertheless useful in explaining the political behavior of the principal characters, in the state and in society, of the regime. Moreover, for our purposes, the patrimonial model helps us to understand why the marginalization and eventual emasculation of the judiciary was necessary to the regime's survival.

The beneficiaries of the state's largesse during the New Order included the armed forces, particularly the army, big business, political adversaries, members of the traditional ruling elite and, of course, members of Soeharto's immediate and extended family along with their business associates. These beneficiaries helped to give the regime economic as well as political stability and, to a significant extent, even political legitimacy. Recall that for a significant number of years during the New Order, before the onset of the Asian financial crisis in 1997, Indonesia experienced tremendous economic growth. Although it never quite achieved the status of a 'tiger' economy,²⁷ Indonesia was one of the eight 'high-performing Asian economies' that formed the nucleus of the so-called 'East Asian Miracle' (World Bank 1993). Indonesian big business, especially ethnic Chinese Indonesian businesses, contributed a great deal to this economic boom. To be sure, the economic growth was also attributable to foreign capital, but Indonesian domestic private capital contributed between 50 and 70 percent of the country's GDP (Hill 1990). Always mindful that economic stagnation was what had brought down his predecessor, Soeharto constantly worried about Indonesia's economy. For many Indonesians, the vastly better living conditions during the New Order, relative to the period under Soekarno's Guided Democracy, were the sole source of Soeharto's political legitimacy. As to the armed forces, their allegiance was indispensable in times of political turmoil. As Bresnan (1993: 111) pointed out,

²⁷ The four 'tiger' economies are Hong Kong, South Korea, Singapore and Taiwan. The other economies included in the World Bank study were Japan, Indonesia, Malaysia and Thailand (World Bank 1993).

“[w]hen the youth of the capital were [demonstrating] in the streets, the armed forces were the ultimate political resource.”

In return for their political loyalty, Soeharto generously showered his clients with favors. For example, a company controlled by Liem Sioe Liong, one of Soeharto's closest associates, was given the monopoly rights to import cold-rolled steel. His company was given US\$20 commission per ton of cold-rolled steel imported plus a 2.5 percent “handling fee” of the value of the import. Given that Indonesia imported more than US\$400 million cold-rolled steel in 1984 and 1985, the arrangement put a great deal of money into the coffers of Liem's company (Bresnan 1993: 250). Senior military officers, too, were allowed to use their positions in the bureaucracy to make money for themselves and for use by the armed forces. These officers regularly demanded ‘commissions’ from suppliers (Crouch 1978: 285). Commissions were also paid by contractors involved in construction projects for the government (*ibid.*). Many army officers were given managerial responsibilities not only in the military bureaucracy but also in state-owned civilian enterprises. General Ibnu Sutowo, for example, was in charge of Pertamina, the large state-owned oil company. General Ibnu used his position and influence as head of Pertamina to arrange business deals for private parties. He would, of course, be paid for his services (*ibid.* at 287). Other senior military officers would enter into joint ventures with foreign investors. The incentive for foreign investors to enter into joint ventures with military officers was, of course, the position these officers had in the government bureaucracy and state-owned enterprises, which gave them concessions and privileges as well as protection. The twin pillars of economic growth and brutal repression by the armed forces of malcontents within Indonesian society were essential to the regime's hold on power.

For the patrimonial model to work, the state must be able to function with considerable discretion. A system of government in which rules and regulations are applied objectively and impartially simply cannot support patrimonial rule. A politician cannot expect political loyalty from a person who has received the benefits of state power through an objective and impartial process. The very nature of a patrimonial system demands a high degree of subjectivity and partiality. For example, a company with low capitalization and no track record in milling wheat into flour would not ordinarily be given an exclusive contract to supply flour to a large portion of the country. Yet, that is what happened in Indonesia when Bogasari Flour Mills—controlled by Liem Sioe Liong, Soeharto's long-time crony—was given an exclusive license to mill

flour for the western half of Indonesia. Bogasari was also given a Rp. 2.8 billion loan from state-owned banks just five days after it was incorporated with a capital of only Rp. 100 million (Robison & Hadiz 2004: 56). Another example was the government's plan to manufacture a 'national car' (Kingsbury 1998: 209-18). The idea had some merits. It had the potential to create employment not only in the manufacture of cars but also in the manufacture of component parts. The plan mandated that 60 percent of the car's parts were to be locally produced within three years of the start date. It could also help improve Indonesia's balance of trade through import substitution and subsequently through exports (ibid.). But the project was given to Soeharto's youngest and favorite son, Tommy, who had little to no experience in the car business, no car manufacturing plant, and no capital with which to build one (ibid.). Clearly, Tommy Soeharto was a person least qualified to entrust with such an important national project. There were certainly other more established parties since the assembly of foreign automobiles was already a thriving business in Indonesia.

These arrangements between Soeharto's regime and private parties often resulted in direct violations of laws. In another example, by issuing a presidential decree, Soeharto gave his son Tommy's company the monopoly rights to buy and sell cloves throughout Indonesia. Cloves are an important commodity in Indonesia because of the popularity of *kretek* cigarettes among Indonesians. These cigarettes are scented with cloves and preferred by about 90 percent of Indonesia's 45 million or so smokers (Schwarz 1994: 153). It is estimated that cigarette sales in Indonesia amount to US\$3 billion annually (ibid.). In terms of *kretek* production costs, cloves account for about 30 percent (ibid.). Thus, the sale of cloves constitutes a large business in Indonesia, and the rents that can be captured from a monopoly of the sale of cloves amount to a significant amount of money. But the cloves had to be purchased from the farmers in whose interests the monopoly was authorized. The monopoly was supposed to give a better return to the clove farmers vis-à-vis the strong and organized association of cigarette manufacturers. Tommy Soeharto persuaded his father to strong-arm the central bank to lend his company US\$350 million with which to purchase cloves. The problem with this arrangement was that it involved public money, and Article 23 of the 1945 Constitution required any decision involving public finance be taken by the country's parliament. A presidential decree was thus a legally insufficient government authorization for Tommy Soeharto's clove monopoly (Aditjondro 2002: 10). The presidential decree authorizing the clove monopoly also violated Law No. 3/1971

on corruption since it was designed to enrich a member of his family through a violation of law—Article 23 of the Constitution—and was detrimental to state finances and the economy (ibid.). There are many other examples of laws being broken to enable Soeharto to bestow favors on his family members and his cronies. Apparently between 1993 and 1998, 79 of the 528 presidential decrees Soeharto issued could be considered as falling within this category (ibid. at 9).

Under the patrimonial system, Soeharto always needed a ready source of off-budget funds to spend on his clients. One source was aforementioned Pertamina, the state-owned oil company headed by General Ibnu Sutowo. Through Pertamina, Soeharto was able to create business opportunities for his cronies. The money was borrowed from foreign banks. General Ibnu used Pertamina to collateralize the loans. In this way, the loans would be considered ‘sovereign’ loans backed by the Indonesian government. They were thus considered low risk by the foreign banks. These loans were then used to finance various projects, which would be given to Soeharto’s cronies. Although there were procedures for tendering these projects, General Ibnu would bypass the economists at Bappenas,²⁸ the National Development Planning Agency, who were supposed to be in charge of “delivering private and institutional capital to the Indonesian system” (Winters 1996: 85). The Bappenas economists wanted to shut down this alternative ‘channel’ of capital flowing into the country. With the IMF and the World Bank putting pressure on the Indonesian government, the economists succeeded in getting Law No. 8/1971 passed, which required all state-owned enterprises to get approval from the Ministry of Finance before obtaining loans of a specific type, for example, short-term loans that mature after three to fifteen years. As a state-owned enterprise, Pertamina was covered by this law. But the law was circumvented with Soeharto’s approval (ibid. at 85-86).

Pertamina’s debts to foreign banks continued to pile up. Eventually, the economists—once again with help from the IMF—managed to enforce Presidential Decree No. 59/ 1972, which prohibited Pertamina from obtaining foreign loans that mature from one to fifteen years (ibid. at 86-87). This so-called medium-term debt was very popular with banks because it was less risky than long-term debts which mature only after 15 years. Not many banks would be willing to enter into such long-term commitments. To prohibit Pertamina from entering into short-term loan contracts would ham-

²⁸ *Badan Perencanaan Pembangunan Nasional.*

per its ability to obtain working capital (*ibid.* at 87-88). With Pertamina's debt at dangerously high levels, the presidential decree was therefore intended to minimize Pertamina's ability to obtain the type of credit that foreign banks were eager to supply. Although it never actually violated the letter of the law, Pertamina circumvented it by entering into long-term contracts that, by the terms of the contracts, obligated Pertamina to pay back the bulk of the debt in five to ten years (Bresnan 1993: 177). Pertamina also circumvented the law by entering into short-term contracts that were then continuously rolled over after maturity. Pertamina's short-term debt grew from under US\$500 million at the end of 1973 to US\$1 billion by the end of 1975 (Winters 1996: 89-90). In a country with a strong rule of law, such behavior on the part of state-owned corporations would be unlikely to be tolerated. Cronyism and corruption can only be tolerated in a jurisdiction where the "rule of discretion" prevailed.

The system of politics under the New Order also permitted what amounted to stealing from the government and the Indonesian people. In flour milling, for example, Bogasari Flour Mills was allowed to buy wheat at highly-subsidized rates from the government and to apply a 30-percent margin when selling the flour back to the government. Apparently, this margin was five times higher than what US millers—considered to be high-cost millers—could expect to receive (Schwarz 1994: 111). Sarpindo, a soybean crushing plant jointly owned by Tommy Soeharto and two of his father's closest cronies—Mohammad "Bob" Hassan and Liem Sioe Liong—was allowed to charge the government about US\$12 for each ton of soy bean crushed. The resulting soymeal—important to shrimp and chicken farmers—cost between 40 and 50 percent higher than imported soymeal (*ibid.* at 134).

Corruption inevitably involved the overpricing of government procurements. This, too, is a form of theft. Pertamina was responsible for distributing oil throughout the Indonesian archipelago. As such, it owned and commanded a huge tanker fleet. The procurement of tankers provided a good opportunity for overpricing. In one case, Pertamina purchased a tanker from an American supplier for US\$150 million, which made it way above market price in a then-depressed tanker market. A tanker with an equal capacity was available from Norwegian suppliers at US\$100 million (Robison 1986: 237). Where did the extra US\$50 million go? Pertamina also leased tankers. The cost of leasing 23 tankers during General Ibnu's watch—over US\$2.7 billion—was so high that it was unlikely to have been negotiated in arm's length transactions (*ibid.*). Overpricing at Pertamina typically amounted to about 40 percent above market

value. Officials at the company also typically picked 30-percent kickbacks on shipping contracts (*ibid.*). Overpricing amounted to a transfer of public funds into private pockets in the case of Pertamina or an illegal tax on private entrepreneurs such as chicken and shrimp farmers on their raw-material costs.

The cost to the country was not only in terms of the public money lost but also in terms of the environment. Mohammad “Bob” Hassan had forestry concessions over two million hectares in Kalimantan, one of the major islands north of Java. Due to Hassan’s close connections to Soeharto, he was able to ignore environmental laws that regulate the rate at which trees can be felled. A World Bank study estimated that trees were being felled at a rate 50 percent higher than is consistent with sustainable forestry exploitation (cited in Schwarz 1994: 140). Environmentalists also allege that reforestation funds were fraudulently used. Apkindo, the powerful plywood cartel headed by Hassan, was able to exert its influence on Soeharto to prevent the government from increasing royalties and other payments that the forestry industry must pay on trees that they fell. Because of this, the government had lost potential annual revenues that had been estimated at about US\$500 million (Schwarz 1994: 140). This and the other examples discussed above show the importance of the rule of discretion to Soeharto’s New Order. The regime needed a weak judiciary that would not be able to restrain the government’s power. But did patrimonialism end with the downfall of the New Order?

III. Patrimonialism as an Informal Institution

S.N. Eisenstadt (1973) pointed out that when ‘patrimonialism’ is used to describe a political regime, it has often been with the purpose of highlighting its traditional nature. It may be argued, therefore, that the term would have limited utility when used to examine relatively complex political regimes in which some semblance of a rational-legal bureaucracy may be detected. Thus, when commentators have used the term to describe the political regimes of underdeveloped countries in the post-colonial era, they have often emphasized one characteristic of patrimonialism—“its personalism”—and concentrate their analysis on factors that create the optimum conditions under which “personalistic rulers [manage] to perpetuate themselves in positions of power” (Eisenstadt 1973: 11). This preoccupation with optimum conditions, though useful in pushing the analysis towards uncovering what personal rulers must do to stay in power, ultimately also pushes it towards a focus on regime instability. Guenther

Roth (1968), for example, suggested that a focus on personal rulership in underdeveloped countries would help explain why political regimes in these countries are chronically unstable. This political instability, he argued, may be the fundamental reason why economic underdevelopment seems to persist in these countries. A constant preoccupation with maintaining political power takes time away from pragmatic problem-solving needed in the economic sphere.

Harold Crouch (1979) has used this same concept of patrimonialism to describe the Indonesian political system under the New Order. He correctly stated that a patrimonial ruler must be able to assure a constant stream of benefice payments to his supporters in order to retain their loyalty (*ibid.* at 572). In practice, this means the ability of the ruler to provide his supporters with rent-seeking opportunities. In Indonesia, President Soeharto, through his control of state-owned enterprises, especially Pertamina, was able to channel millions of dollars to his supporters in return for political loyalty. He was also able to grant monopolies which his supporters used to charge consumers supra-competitive prices. The flour milling monopoly Soeharto gave to Liem Sioe Liong was an example of this. Thus, rent-seeking and corruption are essential components of patrimonial rule.

Crouch (*ibid.*) argued that the stability of patrimonial politics depended upon political elites confining themselves to the struggle over “the distribution of the rewards of office”. In other words, for patrimonial rule to remain stable, politics must not involve ideological struggles over government policies. As Crouch (*ibid.*) has put it, “the elite must be ideologically homogeneous”. Moreover “the masses must . . . be [kept] passive and isolated from the political process” (*ibid.*). Absent these conditions, that is, ideological homogeneity of the political elites and exclusion of the masses from political participation, patrimonial politics becomes unstable.

Soekarno’s Guided Democracy became unstable and eventually collapsed precisely because it stood on “non-patrimonial foundations”. What Crouch meant was that mass-based politics had become an important factor during Guided Democracy due to the increased influence that the Indonesian Communist Party, the PKI, was beginning to exercise on Soekarno’s government. Moreover, the increasing influence of the PKI on Soekarno had also introduced a growing ideological struggle between the

PKI and ABRI,²⁹ the Indonesian armed forces. These two factors, Crouch argued, were enough to upset the ideal conditions on which patrimonialism thrived.

But, as Crouch (1973) himself was aware, Soekarno's Guided Democracy did not so much fall as it was brought down with the help of external forces. John Roosa (2006) has presented an interesting interpretation of the events surrounding the failed "coup" attempt in 1965, which suggested that Soekarno's downfall was really the result of strategic geopolitical considerations in the context of the Cold War. Indonesia's immense oil and mineral deposits made the country strategically very important to the United States and its allies, particularly Japan. Indonesia could not be allowed to fall into the hands of the communists. In fact, strategically, Indonesia was far more important than Vietnam, which had little natural resources. Vietnam was merely the 'gate' protecting the 'house'—Indonesia—that contained the real treasure trove. The growing influence of the PKI, at that time the largest non-governing communist party in the world, was therefore a very worrying development to intelligence and national security circles in Washington, D.C. They began actively to undermine the communists as early as the Eisenhower administration when Washington supported separatist rebellions in Sumatra and eastern Indonesia.³⁰ When this strategy failed, Washington concentrated its efforts on fostering ties with the Indonesian military. It brought as many as 2,800 army officers for training in the United States and spent US\$10 to US\$20 million a year between 1958 and 1965 in military assistance to Indonesia (ibid. at 183).

But both Washington and the anti-communist Indonesian generals knew that they could not simply stage a coup d'état against the very popular President Soekarno. Doing so would be widely perceived as illegitimate and result in long-term political instability for the new regime. "For a coup d'état to succeed in Indonesia, it would have to be disguised as its opposite: an effort to save President Soekarno" (ibid. at 190). They needed a "pretext" and finally got one when D.N. Aidit, the leader of the PKI, along with some of his most trusted lieutenants, in an ill-advised and badly-organized attempt to pre-empt the generals, joined forces with some left-leaning army

²⁹ *Angkatan Bersenjata Republik Indonesia*. The term was subsequently changed to *Tentara Negara Indonesia* (TNI).

³⁰ The Dulles brothers—John Foster, Secretary of State, and Allen, Director of the CIA during the Eisenhower Administration—took Soekarno's non-aligned posture, "repeated denunciations of Western imperialism, and willingness to include the Communist Party as an integral component of Indonesian politics . . . as proof of his allegiance to Moscow and Beijing" (Roosa 2006: 178).

officers jealously loyal to Soekarno to abduct six generals and thereby force the president into a more radical stance. The bungled operations resulted in the death of all six generals. This became the pretext that the military had been waiting for. The result was the mass murder of between 500,000, as a conservative estimate, and two million people and the decimation of the PKI as a political force in Indonesia. It would have been difficult for then-Maj.-Gen. Soeharto to succeed without Washington's help. Success was possible only with the material aid that Soeharto received as well as intelligence information that Washington provided.³¹ In the aftermath of the killings, moreover, Washington and its allies also poured in humanitarian and financial aid to help shore up the New Order's legitimacy (Roosa 2006: 197).

Crouch (1979: 575-79) argued that under Soeharto, conditions favorable to patrimonial rule were re-established after the downfall of Guided Democracy. But the requirements of economic development, which had taken place under the new regime, had brought new pressures to bear that would once again cause those ideal conditions to disintegrate. Crouch enumerated two developments in particular: first, the increasing demand for regularization of economic and political life brought about by the rapid pace of economic development and, second, the growing discontent of the middle classes as well as of the urban poor (*ibid.* at 579-85). As an example of this discontent, Crouch cited the riots that took place in 1973 and 1974 (*ibid.* at 584). Because of his perspective on patrimonialism, Crouch's conclusion was fairly optimistic in that it predicted the eventual collapse of patrimonialist politics in Indonesia as changing conditions continued to erode the New Order's patrimonial foundations.

Crouch's use of patrimonialism in his study of Indonesian politics is a good example of its application as an analytical device to differentiate political regimes and to indicate a specific level of development in a process of social and political evolution (*see* Eisenstadt 1973). Seen in this way, patrimonialism is a phase that would disappear as soon as socio-economic conditions change. Thus, rent-seeking, as a trait of patrimonialism, would eventually disappear as the demand for regularization increased. Changes in socio-economic conditions brought about by economic development would also usher in the rule of law as demands for regularity and predictability continuously worked to limit discretionary political authority. Crouch's use of this analytical device therefore assumes a certain inevitability to social change.

³¹ For example, the U.S. Embassy in Jakarta provided him with a list of several thousand members of the PKI (Roosa 2006: 195).

In his analysis of politics in the Philippines, Paul Hutchcroft (1991 & 1998) used patrimonialism to the same effect. Hutchcroft's contribution was to show that patrimonialism can exist and thrive in a formally democratic context. But instead of predicting change in the Philippines, Hutchcroft was looking for the causes of economic and political stagnation especially when compared to countries like Thailand and Indonesia. This is a reasonable approach given the assumptions Hutchcroft made about patrimonialism. If social change comes about in a lineal evolutionary process, then there is a certain amount of inevitability to it. That change had not appeared as expected therefore demanded explanation. Hutchcroft refined the approach that Crouch took earlier and developed two distinct models of patrimonialism: he called the first "the patrimonial administrative state" and the second "the patrimonial oligarchic state" (Hutchcroft 1998: 46-55). Into the first model, he put Indonesia and Thailand, and into the second, the Philippines.

Like Crouch, Hutchcroft—writing almost twenty years later—argued that economic development eventually forced the New Order to concede to demands for regularization. He pointed to the politically well-insulated technocrats in Indonesia who were able to impose top-down reforms successfully (*ibid.* at 48-49). Unlike in the Philippines where the patrimonial oligarchic state was helpless to force similar reforms against the resistance of the oligarchy, the patrimonial administrative state in Indonesia was eventually able to evolve into a more legal-rational bureaucratic state. The proof? One only had to consider the phenomenal GDP growth that took place in Indonesia and Thailand—growth that prompted the World Bank to call these two countries "emerging tiger economies"—and compare it to the dismal growth pattern in the Philippines.

Economic growth was dismal in the Philippines because it had an incoherent bureaucracy that was largely politically-dependent on an oligarchy that had established its power base outside the government. Members of the oligarchy participated politically by obtaining seats within the legislature. From there, they were able to place people in the bureaucracy who were then personally loyal to these individual oligarch/politicians. From this political vantage point, the oligarchs were able to plunder the Philippine state. Hutchcroft (1998) referred to this arrangement as "booty capitalism". He distinguished this from the "bureaucratic capitalism" that he argued existed in Indonesia and Thailand. Whereas bureaucratic capitalism was able politically to evolve into a more legal-rational regime, booty capitalism could not because the sys-

tematic plunder of the state by the oligarchy left its economy perpetually in the doldrums. Accordingly, the demand for regularization that had eroded the patrimonial foundations of Soeharto's regime never surfaced in the Philippines.

Hutchcroft has presented a good explanation for why the Philippines has never been able to evolve politically and economically. But he was quite mistaken about the nature of patrimonialism in Indonesia. The New Order was every bit as rapacious and venal as the political regimes that came before, during and after the Marcos dictatorship in the Philippines. Patrimonial plunder by the political elites continued unabated during the New Order until the very end. Indeed, calls for an end to KKN (Corruption, Collusion and Nepotism)³² became the rallying cry for students and other demonstrators during the political crisis in 1998 that eventually brought about the downfall of the New Order.

The New Order elites were also resistant to reforms. The vaunted technocrats exercised influence only when oil prices caved and money from development assistance dried up, thus threatening the supply of funds needed for patron-client politics. Otherwise, the technocrats' policies were ignored or circumvented probably just to the same degree that those of their Filipino counterparts were discounted and resisted (Winters 1996; Robison & Rosser 1998). Whatever reforms were actually implemented was hodge-podge and eventually amounted to little in terms of delivering the Indonesian economy from the devastation of the Asian financial crisis.

Neoclassical economists ventured the explanation that the ineffectiveness of reforms was due to their incorrect sequencing (Bhattacharya & Pangestu 1992). That may be true, but, as Richard Robison and Vedi Hadiz (1998: 121) have pointed out, "the sequencing of reforms was not a matter of technical choice." Those reforms that served the business interest of the elites were allowed to be implemented while those that "prevented their access to lucrative opportunities in banking, public infrastructure, television and air transportation" were impeded (ibid.). Thus, how the reforms were sequenced was the direct result of the political choices that the elites made and was not the product of happenstance.

If rent-seeking and corruption were as rampant in Indonesia as they were in the Philippines, what accounts for the big difference in their respective economic performance? Andrew MacIntyre (2000: 264-68) has offered an interesting and persuasive

³² *Korupsi, Kolusi dan Nepotisme*.

explanation. He argued that due to the highly-centralized nature of the political system under the New Order, Soeharto was able to exercise monopoly power over rent-seeking activities and thereby control who were allowed to accept bribes and how much they could charge. Imagine, MacIntyre urged, that a bureaucratic permit is a 'good' that an official can sell for a price (corruption) and that in order to make an investment in Indonesia, an investor needed five different permits from five different government agencies. Under a decentralized power structure, each of these five officials would have an incentive to maximize their respective prices. The total cost of the five permits in that case may be prohibitive. But with Soeharto in control, he could 'regulate' the prices of these individual permits so that the price of the total 'package' would remain reasonable. Moreover, Soeharto could insure that each official actually delivered his respective permit at the prices agreed upon. An investor under these circumstances would then have something closely resembling secure property rights in these permits. Under a decentralized power structure, by contrast, an investor could never be assured of the security of his property rights in the individual permits. An official, unconstrained by a central authority, could decide that he wanted more money after the sale had been made. Under a decentralized system, there is no certainty and no predictability. This stood in marked contrast to the highly centralized system of the New Order.

Thus, even under conditions of rent-seeking and corruption, an investor was secure in the knowledge that, even in the absence of the rule of law, he could rely upon the 'political certainty', if not the legal certainty, that Soeharto's regime provided. Due to the decentralized nature of the Filipino political system, except under Marcos,³³ an investor obviously could not count on such 'political certainty' in the Philippines. Clearly, the conditions for economic growth were markedly different in the two countries. In terms of their patrimonialism, however, the New Order and the various political regimes of the Philippines were more similar to each other than they were dissimilar. MacIntyre's explanation, therefore, neatly accounted for the widely differing economic performances of two countries with very similar political regimes.

S.N. Eisenstadt (1973: 60) argued that the term 'patrimonial' would be most useful in analyzing the underdeveloped, but reasonably complex, countries of the third

³³ Despite centralized control during the Marcos dictatorship, there was never any attempt to centralize control over rent-seeking activities. Instead, there was simply a "centralization of patrimonial plunder" (Hutchcroft 1998: 111-15).

world when it is conceived of as “a specific way of coping with the major problem of political life” rather than as a way of noting those countries’ phase of development or of differentiating their political regimes. The term ‘patrimonial’ used in this fashion would lead to an identification or classification of a particular type of political *behavior* rather than types of regimes or phases of political and social development. One could then say that giving a supporter or potential supporter a rent-seeking opportunity in return for personal loyalty is a ‘patrimonial’ way of consolidating political power.

The patrimonial way of coping with political problems has deep roots in Indonesia. Patrimonialism did not simply appear with the onset of Guided Democracy. Ben Anderson (1972: 33) noted that “the administrative structure of the pre-colonial Javanese kingdom . . . admirably fit[ted] Max Weber’s model of the patrimonial state.” In the Javanese kingdom, state administration was financed by means of “royal monopolies” and the “appanage system of benefices” (ibid. at 34-36). Thus, the salaries of officials consisted of the economic surplus that could be extracted from the sovereign’s lands. Officials did not own the lands, which remained the property of the crown. In the same way, officials in modern Indonesia are allowed to extract the economic surplus that can be obtained through their offices.

Accepting bribes in return for official permits is, therefore, a time-honored tradition that dates back to at least the early 15th century. During the New Order, as Crouch (1979: 577) has pointed out, “most members of the military elite regarded the use of their official powers to provide amenities for colleagues, relatives, and friends, or in exchange for commissions, as *normal practice*” (emphasis added). In fact, the “use of an official position for self-enrichment was . . . not regarded as corruption” at all (ibid. at 578). Officials in the pre-colonial Javanese kingdom were expected to use the surplus to help finance the expenses incurred in the execution of their duties and not only to line their own pockets. In today’s Indonesia, it is typical for ministers to maintain off-budget funds, replenished through corruption, to pay for expenses that are not items in their department’s official budget (MacIntyre 2000). As Anderson (1972: 49) pointed out, “corruption has become an essential element in the stability of bureaucratic organization” in Indonesia.

To the extent that these types of political behavior have achieved legitimacy through tradition, as they appear to have done in Indonesia, they have become social norms and, as such, can be considered as ‘institutions’ in the sense of rules that guide and constrain political behavior. Normally, of course, corruption, nepotism and clien-

telism are more readily recognized as *violations* of formal rules. But where these breaches of the formal rules have taken on systemic proportions, certain commentators have argued that it would be more appropriate to characterize them instead as informal rules. When corrupt behavior not only goes unpunished but is instead rewarded, then corruption *is* the rule that governs social behavior. Darden (2002), for example, has argued that corruption can be construed as an informal mechanism of state control. Lauth (2004) cited clientelism and corruption as classic examples of informal political institutions. These informal *institutions*—or the ‘rules of the game’, in North’s (1990) sense of the word—guide people’s behavior through incentives and sanctions, much in the same way as formal institutions do. But whereas with formal institutions, sanctions typically translate into punitive fines and jail sentences, with informal institutions, they are “linked largely to social mechanisms of exclusion or [are] based quite simply on the condition that [their] non-utilization minimizes the chances of gaining access to goods and services” (Lauth 2004: 6). Thus, an aspiring judge during the New Order could not gain career advancement without paying the necessary bribes to the appropriate persons in the Department of Justice. Similarly, managers of a business enterprise readily resorted to corruption if the alternative would result in the failure of the business. Seen from this perspective, the incentives—as well as the sanctions—of informal institutions can be just as persuasive in guiding behavior as those of formal rules.

How are these informal institutions related to the formal rules of the game, viz. to the statutory laws, regulations, and constitutional provisions of the country? Many informal institutions actually *complement* the formal rules, making them function better. Often the informal rules fill in the gaps in the formal rules—gaps which had not been anticipated at the time that statutes were enacted. Informal institutions may also act as a “foundation” to the formal rules. Thus, shared beliefs in democracy, the separation of powers, and the rights of individuals vis-à-vis the state may have helped the US Constitution to become effective as that country’s fundamental governing principles (Helmke & Levitsky 2004, Lauth 2004). But other informal institutions *compete* against the formal rules; that is, the informal rules conflict with formal ones and individuals cannot choose to obey both since obeying the informal rules necessarily implies disobeying the formal ones (ibid.). Patrimonialism, and the corruption that inevitably attends it, are classic examples of competing informal institutions. If patrimonialism has managed to penetrate or occupy the state, then it has effectively become the

fundamental governing principles, the “constitution” as it were, of that country (Lauth 2004). Individuals in that country cannot obey the rule of law without violating the basic tenets of patrimonialism. The inverse would, of course, also be true. One cannot hope to prosper under patrimonial rule and, at the same time, observe the rule of law.

Looking at patrimonialism as an informal institutional arrangement, rather than as a particular type of political regime or a stage of development, leads to a better understanding about its resilience and persistence. As the persistence of patrimonialist politics in both Guided Democracy and the New Order shows, informal institutions can persist even as regimes fall. This is true even when elite personalities of the old regime fail to survive politically in the new one. Witness the fact, for example, that most of Soekarno’s cronies failed to hold on to their fortunes and disappeared politically after Soeharto assumed power (MacIntyre 1994; Robison & Hadiz 2004). Of course, if these elite personalities do survive the change of regime, then bringing about an institutional change in the new regime becomes, indeed, very problematic.

IV. Conclusion

This chapter has shown that the dysfunctionality of the Indonesian judiciary was deliberately brought about by the government because a competent, honest and independent judiciary would have undermined the government’s patrimonial power base. The dysfunctionality of the judiciary was therefore not the result of unintentional neglect by the government. By abusing the system of dual court administration whereby the judicial system is administered by the Department of Justice—an executive branch department—the government had sought to control the appointment, remuneration, and career path of judges at the trial and appellate levels, thereby compromising their independence. This abuse eventually insured the corruption of the judiciary.

The subsequent discussion of the patrimonial nature of Indonesian politics showed why it was necessary for the government to subvert its own judiciary. The way political power is maintained under patrimonialism made it imperative that political leaders have the widest possible discretion in determining economic winners and losers. Accountability of political leaders to the judiciary under a system of objective rules impartially applied would have undermined the “rule of discretion” so necessary to patrimonial rule. Patrimonialism, the chapter concluded, is best understood as a set of informal institutions that govern political behavior in much the same way that for-

mal institutions do. On the other hand, patrimonialism as a set of informal institutions competed against formal institutions (i.e., statutes and regulations, etc. that have been formally adopted), in the sense that obedience to the informal rules necessarily implies disobedience to the formal ones. Like all institutions, patrimonialism can be stable and enduring. Eradication of the informal institutional arrangements of patrimonialism can only be brought about by a sufficiently powerful constituency willing to take action—often violent action—to bring about the necessary changes. In the next chapter, the thesis will discuss the *Reformasi* movement that brought about the downfall of Soeharto's New Order to determine whether *Reformasi* was a movement that was inspired and led by a constituency powerful enough—economically and politically—to bring about the necessary changes to eradicate patrimonialism in Indonesia.

Chapter 3

Downfall of the New Order and *Reformasi*: Implications for the *Negara Hukum*

The New Order came to an abrupt end on May 21, 1998, when President Soeharto—abandoned by his supporters among the political elites within the state and beleaguered from without by massive demonstrations led by student activists in Jakarta and many major cities throughout the archipelago as well as by uncontrolled rioting—was finally forced to resign from office. His departure marked the beginning of the era of *Reformasi* in Indonesian politics. The legislature, long dormant, began to reassert its independence from the executive. Political parties, once restricted to three in number, began to proliferate. Local and provincial governments, once tightly controlled by Jakarta, began to assert themselves more independently. The press was freed of the shackles that had been put upon it during the New Order. Most exciting of all, fair and free elections began to be held for the first time in Indonesia since the democratic era between independence from colonialism and the advent of Guided Democracy.

Concurrent with these changes in Indonesia's political institutions was the drive by activists, mainly lawyers, to establish the *negara hukum*, the rule-of-law state, in Indonesia. The term is a literal translation of *rechtsstaat* from the Dutch. As such, its meaning originally reflected the Dutch concept. Moreover, having come from Holland but through the colonial legal system, the term came to mean, to most Indonesians, the rule *by* law instead of the rule *of* law. As Daniel Lev (1985: 57) has put it, "colonial law, which established the genetic pattern of the Indonesian state, was intended primarily to make exploitation efficient." With independence, this rule *by* law concept of the *rechtsstaat* was carried over into the legal system of the fledgling republic. *Negara hukum*, as it was originally understood, therefore, carried no notions of constitutional protections for individuals nor, even, as the practice under both Guided Democracy and the New Order subsequently showed, did it provide for an independent judiciary.

But this was not the vision of the *negara hukum* that *Reformasi* activists were fighting to bring about in Indonesia. Nor, indeed, was it the vision that their predecessors during the mid- through late-1960s tried to bring about but failed (Lev 1978). Instead, both groups of activist lawyers, separated by some 30 years, were trying to bring about a new and radically different vision of the *negara hukum*. Their vision consisted

of a judiciary that would be not only independent from the executive but one that would also exercise review powers over legislative and executive action. It was to be a revitalized judiciary that was intended to bring legal certainty and predictability into the country's socio-economic and political life. This vision, therefore, stands in marked contrast to the 'constitutional norms'—or, as Lev (1978: 40) had put it, "the terms by which the elites govern"—that have prevailed in Indonesia for over five decades.

In chapter 2, we saw that those terms supported instead a patrimonial mode of governance whose essence was the *rule of discretion*—political patrons get to decide, without recourse to rules and regulations, who gets what and when in return for personal political loyalty from their clients. The patron's political power is highly dependent on his ability to continue to give these benefice payments to his clients. This discretionary exercise of political power that patrimonialism required, of course, resulted in a great deal of legal arbitrariness in socio-economic and political life. The change that *Reformasi* activists sought, therefore, represented a fundamental departure from heretofore existing political norms.

Fundamental changes have certainly taken place in Indonesia since the downfall of the New Order. But are these changes fundamental enough to constitute a genuine break from the patrimonial mode of governance long established in Indonesia? In a sense, Indonesia could even legitimately claim to be a democracy. Isn't democratic governance inconsistent with patrimonialism? One only has to look at The Philippines to see that a patrimonial mode of governance is able to survive and even to thrive in a formally democratic setting (Hutchcroft 1998). Classically, patrimonialism consists of a series of patron-client relationships in pyramid fashion, with the chief patron at the apex. But in The Philippines, except during the Marcos years, the state is controlled by a powerful oligarchy whose members sit in the country's legislature (Anderson 1988; Hutchcroft 1991). Although the mode of governance there follows the patrimonial model, political power itself is diffused among members of the oligarchy rather than centered in one person as in Indonesia during the New Order.

Patrimonial governance is obviously antithetical to the rule of law. Whether defined formally or substantively, the rule of law requires, at minimum, that state officials be bound by law in their conduct of state business (Tamanaha 2004). Furthermore, in a rule-of-law state, laws must be "prospective, general, clear, public, and relatively stable" (ibid. at 93). These requirements work to limit and minimize the discretionary authority of state officials. To ensure that state officials obey the law in their

conduct of state business, the rule-of-law state also requires the presence of a politically-independent judiciary that is honest and competent. With such limitations on the discretionary authority of state officials, the rule-of-law state is clearly inhospitable to and inconsistent with patrimonial governance.

This chapter explores the question whether *Reformasi* has made a real difference in terms of establishing the rule of law in Indonesia. Does *Reformasi* represent a genuine break with the past—that is, with patrimonial governance—or does *Reformasi* merely signify a change of regime? If there has been continuity of patrimonial governance across regimes, then it is difficult to see how the rule of law can take proper root in Indonesia. In part I, the chapter begins by examining the ‘law-movement’¹ that appeared in the wake of *Reformasi*. Next, the chapter addresses in part II the issue of whether patrimonial governance has persisted in post-Soeharto Indonesia and examines the conditions under which an informal institution like patrimonialism could be replaced by a rule-of-law system. To explore this issue in greater detail, part III then discusses the nature of the downfall of President Soeharto and the role that the Asian financial crisis played in it. It addresses the question whether the political crisis brought about by the financial crisis unleashed a social revolution capable of bringing about radical changes to Indonesia’s political system or whether the political crisis merely precipitated an on-going political struggle for succession. To a significant degree, the answer to this question will determine the prospects of a successful judicial reform in Indonesia. Finally, in part IV, the chapter discusses two major innovations designed to strengthen the judiciary—abolishing the system of dual court administration and giving the judiciary the power of constitutional review over legislation—and asks whether these reforms are real or illusory. The chapter ends with a brief discussion of the current political situation in Indonesia, which gives cause for both optimism and pessimism.

I. Indonesian Lawyers and Judicial Reform

Indonesian lawyers got a head-start over other members of civil society in pushing for judicial reforms. It was the Asian financial crisis that played the catalytic role. In October 1997, the IMF consulted Ali Budiardjo Nugroho Reksodiputro

¹ The term is borrowed from Lev (1978: 39) who defined it as “persistent demands to subject political authority and common social and economic processes to limits defined by a body of conceptually autonomous rules applied by a similarly autonomous legal system.”

(ABNR), one of Jakarta's elite law firms, to help initiate research on Indonesian bankruptcy law in order to deal with the effects of the crisis.² The bankruptcy law then extant in Indonesia was a 1906 legislation drafted by the Dutch during the colonial period.³ This 1906 legislation had been little used and had not been updated since its original enactment.⁴ There was therefore very little experience among Indonesian judges in its application. This and the reputation of Indonesian judges for corruption and incompetence naturally brought up the subject of which court would have jurisdiction to deal with bankruptcy cases. Prominent members of Indonesia's private bar saw this issue as an historic opportunity to push for the creation a specialized court⁵ to hear bankruptcy petitions that would be free from the taint of corruption and political dependency.

Such a court would, in turn, become the beach-head from which an overall campaign to reform the judiciary would be launched. Mardjono Reksodiputro, a founding partner of ABNR, characterized the Commercial Court as "a wedge into the judiciary".⁶ The idea was to create a "modern" court with state-of-the-art equipment in terms of case management, publication of decisions, etc. staffed by honest and competent judges. This "modern" commercial court would then be used as a model of what other courts in the Indonesian judicial system should look like.⁷ Initially, however, the technical legal assistance rendered by the IMF consisted of helping Indonesian officials establish a Steering Committee, which was tasked with selecting judges to be appointed to the Commercial Court, establishing a new and separate physical plant for the new court, training judges in the application of bankruptcy laws, and the training and licensing of practitioners to represent petitioners before the court. Most of what was accomplished in 1998 consisted of training programs for both judges and practitioners.

² Interview with Gregory Churchill, April 12, 2005, in Jakarta. Mr. Churchill was Of Counsel at ABNR during the relevant period.

³ Faillissements Verordening, Staatsblad 1905-217 *juncto* 1906-348.

⁴ The IMF and foreign as well as local bankruptcy experts agreed that the quickest and most efficient way to deal with what was for practical purposes a legal lacuna was to amend the 1906 legislation not through the DPR but through a legal device known as 'Government Regulation in Lieu of Law', which would be valid immediately upon the signing of the legal device by the president. The legal device would have to be ratified by the DPR, the country's legislature within a year for it to remain valid (Churchill 2000: 172).

⁵ Later to be officially called the Commercial Court. The Commercial Court will be fully discussed in chapter 6.

⁶ Interview with Mardjono Reksodiputro, May 3, May 11, and June 6, 2005 and October 25, 2007, in Jakarta. Mr. Reksodiputro was founding partner of ABNR.

⁷ Ibid.

Nevertheless, Sebastiaan Pompe, the IMF's resident legal advisor then in Indonesia, described the effort to create the Commercial Court as a political struggle between the forces of *Reformasi* and the New Order. He pointed out that, institutional reform not traditionally being within the purview of the IMF, the Fund was initially reluctant to engage in the process of establishing the Commercial Court. He also pointed out that the original draft of the April 10, 1998 Letter of Intent from the Indonesian government to the IMF, which contained legal reforms as a conditionality of the IMF bailout,⁸ initially made no reference to a commercial court.⁹

This political struggle was not unlike the one that took place during the mid 1960s when, in an ostensible effort to overturn Law No. 19/1964 that had given President Soekarno the power to intervene at will in the judicial process, lawyers spearheaded a much broader campaign to restore the *negara hukum* (Lev 1978). Then, lawyers focussed on reforming the courts, bent on making them politically independent—by abolishing the system of dual court administration—and investing them with powers of constitutional review. But, in the 1960s, such reforms really meant creating a new vision of the *negara hukum*—not simply restoring an old one—that, in conception, went beyond all its previous incarnations. For the first time, the concept of *negara hukum* became imbued with such constitutional notions as “guaranteeing private rights and restraining political authority” (Lev 1978: 50).

Lawyers are not normally known for their revolutionary zeal. So, why were Indonesian lawyers at the forefront of a movement for radical change? Daniel Lev (1999) argued that during Guided Democracy and, to a more limited extent, the New Order, private lawyers¹⁰ were squeezed professionally by the political system. They could not practise their profession as they had been trained to do. During the colonial period, these private lawyers practised before courts that were “staffed by well-trained, respected private and public lawyers” (Lev 1991: 231). With independence, however,

⁸ The Indonesian government first asked for IMF assistance in October 1997 (Aspinall 2005: 210). A three-year Standby Arrangement between the IMF and the Indonesian government was signed on November 5, 1997 whereby the IMF would extend financial support to Indonesia of up to US\$10 billion (IMF, *The IMF's Response to the Asian Crisis* (1999), Box 3 on Indonesia, available on: <http://www.imf.org/external/np/exr/facts/asia.pdf>). When it became apparent that “the *quid pro quo* for IMF assistance would be a series of neo-liberal reforms which would strike at the heart of ...politico-business and conglomerate power” (Robison & Rosser 1998: 1600), Soeharto balked at implementing them. Due to “policy slippages” on the part of the Indonesian government, it had to issue another Letter of Intent, on April 10, 1998, to reaffirm its commitment to the reforms (IMF, op cit.).

⁹ Interview with Sebastiaan Pompe, April 6, 2005, in Jakarta.

¹⁰ When Lev (1999) talked about private lawyers, he meant advocates or litigators practicing in the private bar. The term, therefore, excluded prosecutors and judges who formed part of the bureaucracy.

the fledgling republic chose to retain the ‘Indonesian side’ of the racially segregated colonial legal system. On this Indonesian side, “symbolic (and real) political-legal authority vested not in [the] courts but in the administrative bureaucracy” (ibid.). Moreover, whenever resort to the courts became necessary, private lawyers, accustomed to clear rules, also found themselves at a disadvantage there. As noted in chapter 2, the criminal procedural codes for native Indonesians during the colonial period¹¹—subsequently retained by the independent state—featured fewer restraints on executive actions and therefore fewer protections of individual rights. Accordingly, the courts were given much more room for discretionary action that resulted in less legal certainty and predictability. The private lawyer’s education and training, on the other hand, were precisely about rules, certainty, and predictability. In this way, the political-legal system that survived the revolution against Dutch rule was inhospitable towards private lawyers and became more so with the advent of Guided Democracy. As Lev (1999: 231) had put it, the political-legal system that appeared after independence, like the ‘Indonesian side’ of the colonial political-legal system before it,

had to do not with legal equality but social and political hierarchy, not individual rights of citizens but the *discretionary* privileges of officials. Here there was room for informal intermediaries and supplicants *but not for lawyers*, for whom clear rules and justiciable rights were [the] minimal requirements of their role (emphasis added).

For private lawyers, working conditions did not get much better under the New Order although, for many, the economic development under Soeharto was to prove a boon for their incomes. The increased pace of economic activity along with the involvement of foreign investors also meant increased legal activity. The number of private lawyers increased dramatically as the money to be made from the profession increased. Along with new graduates came former judges and prosecutors. This increase in the size of the profession also resulted in greater heterogeneity in the group (Lev 1999: 231). As a professional organization, the private bar lost some of its reformist zeal and focus as some of the more prosperous lawyers contentedly retreated into an affluent lifestyle and away from radical reform advocacy.

But the overt patrimonialism of the New Order state was to keep the radical reformist zeal alive within a core group of the profession. As executive control steadily expanded over the judiciary and corruption began to become pervasive among judges, many private lawyers litigating before the courts felt forced to abandon their profes-

¹¹ The *Herziene Indonesisch Reglement* (HIR).

sionalism and ethics. In order to defend their clients' interest, many felt coerced by the system into dealing with judges on terms other than rules and legal reasoning (ibid.). Private lawyers thus had a professional interest in reforming not only the legal but also the political system because so much of the degradation of the legal system resulted from Indonesia's patrimonial mode of governance.

They gathered under the umbrella of Peradin,¹² the Indonesian Advocates Association, to continue to press for a radical reorientation of the legal system. A significant move by Peradin was to create LBH,¹³ the Legal Aid Institute, in October 1970. The brain-child of Adnan Buyung Nasution, LBH provided not only legal services to indigents but also actively pursued 'structural legal aid' by campaigning outside the courtroom to raise public consciousness about the rule of law, especially with respect to individual rights vis-à-vis the state (Aspinall: 2005: 103). Led by Buyung's protégé, Todung Mulya Lubis, the Human Rights Division of LBH engaged in "a huge range of activity" to carry out its structural legal aid program, which included "legal and political criticism, research, publication, education, [and] social outreach" (Lev 1987: 16). Structural legal aid was premised on the conclusion that if the poor in Indonesia lacked access to legal advice and representation, it was because structural conditions—the socio-economic and political systems—impeded that access. Thus legal aid must also be directed at changing these structural conditions, if the poor were eventually to be legally empowered (ibid. at 15).

In its litigation work, LBH also chose to represent clients in politically sensitive cases in order to highlight the need for political change. A staple of LBH's work, in this respect, consisted of land appropriations cases. Economic 'development' in Indonesia often involved taking over land inhabited by the poor for development purposes—which often meant shopping malls, luxury condominiums, office towers, etc.—in return for very low monetary compensation.¹⁴ Its work in these cases exposed the seamy side of the New Order—its corruption and abuse of power. LBH worked very hard not only to win these cases but also to make sure that there would be widespread media coverage of its work through its contacts in several major dailies. The press, another persecuted institution under the New Order, was only too happy to cooperate.

¹² *Persatuan Advokat Indonesia* was established in 1963 under Guided Democracy.

¹³ *Lembaga Bantuan Hukum*.

¹⁴ *Indonesian Legal Aid Foundation*, available at: <http://tcdc.undp.org/sie/experiences/vol16/indonesian%20legal.pdf>.

LBH also worked very hard to make sure that its work received international attention. Buyung Nasution and Mulya Lubis often went abroad to attend conferences and meetings at which they would explain LBH's work and mission (Lev 1987: 24).

As the New Order consolidated itself, the LBH grew to be more and more of a thorn in its side. But the regime dared not move directly against the organization due in large part to its structural legal aid approach and its publicity campaign, both of which had gained for LBH considerable public support within the country as well as internationally. The government chose to move instead against individuals within LBH. For example, the government arrested and detained Yap Thiam Hien, a prominent civil rights lawyer and member of LBH, in relation to his defense of people accused of complicity in the aborted coup of 1965. Other leaders of LBH were similarly harassed by the government (Aspinall 2005: 103). In 1986, the government moved against Buyung Nasution by suspending him from practicing law for a year for a breach of courtroom etiquette—he had interrupted the judge in the subversion trial of Lt.-Gen. H.R. Dharsono while the former was reading the verdict in the case (ibid. at 105-06).

After the downfall of the New Order, LBH was to play an instrumental role in the reform movement to establish the *negara hukum*. It was to give birth to a number of NGOs now active in the reform process—KRHN, ICW and KontraS. KRHN (Consortium for National Law Reform)¹⁵ began life in 1998 as a division of the LBH and did not gain independent status until 2002.¹⁶ Its professed mission is to promote the establishment of laws that enhance democracy and protect human rights as well as to deepen public participation in formulating and shaping such laws. KRHN is also involved in efforts to establish and strengthen institutions and procedures that will act as guardians of such laws. To achieve these ends, KRHN has written press releases and published position papers and books on relevant topics. It has also developed a website.¹⁷

ICW (Indonesian Corruption Watch), founded in June 1998, as its name suggests, is an NGO dedicated to eradicating corruption in Indonesia. It concentrates on investigating and bringing the public's attention to cases of corruption in government.

¹⁵ *Konsorsium Reformasi Hukum Nasional*.

¹⁶ Interview with Firmansyah Arifin, May 25 and October 2, 2007, in Jakarta. Mr. Arifin was Chairman of the Executive Board of KRHN.

¹⁷ <http://www.Reformasihukum.org/index.php>.

It was also involved in the establishment of the Anti-Corruption Court¹⁸ as well as of the KPK (Corruption Eradication Commission),¹⁹ an independent prosecutorial agency responsible for bringing prosecution before the Anti-Corruption Court. Due to the pervasiveness of corruption in the country and the judicial system, in particular, the effort that ICW has made in fighting corruption has great relevance to judicial reforms in Indonesia.

KontraS (Commission for the Disappeared and Victims of Violence),²⁰ was established, in March 1998 by a group of NGOs led by LBH, especially to investigate the kidnappings of student activists by government forces later identified as Kopassus troops led by Lt.-Gen. Prabowo Subianto, and to raise public awareness about these abductions. Later, KontraS became active in human rights issues such as atrocities committed by the armed forces during the Indonesian occupation of East Timor and against separatist elements in the provinces of Aceh and Papua. Its leader, Munir Said Thalib,²¹ was murdered in September 2004 while on board a flight from Jakarta to Amsterdam. Although his killer, Pollycarpus Budihari Priyanto, has been apprehended and convicted,²² it is widely believed that he was merely the triggerman. A large number of calls, immediately before the murder, between Pollycarpus and a high-ranking official of BIN, the National Intelligence Agency, suggests that BIN might have been involved.²³

Through LBH, private lawyers have been at the front to bring about a liberal vision of the *negara hukum* in Indonesia. After the downfall of the New Order, a younger generation of lawyers joined the fray to press for change. In July 1998, Ahmad Fikri Assegaf and Chandra Hamzah, both associates at the law firm of Lubis Ga-

¹⁸ *Pengadilan Tindak Pidana Korupsi*, commonly referred to by its acronym, *Tipikor*. The Tipikor will be fully discussed in chapter 6.

¹⁹ *Komisi Pemberantasan Korupsi*.

²⁰ *Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*.

²¹ Munir began his career as a lawyer for LBH.

²² The tale of Pollycarpus Priyanto included his first conviction of the murder, subsequent reversal of the verdict by the Supreme Court, and the Supreme Court's reversal of its own holding. Pollycarpus is now serving a 20-year sentence.

²³ Maj.-Gen. Muchdi Purwopranjono, deputy chief of BIN, was later identified as the owner of the cellular phone to which Pollycarpus had made a large number of calls. Purwopranjono was subsequently arrested and charged with masterminding the murder. But Purwopranjono was acquitted at trial. The judges concluded that there was insufficient evidence to show that it was Purwopranjono who was using his cellular phone or that indeed that it was Pollycarpus who had made the calls to the cellular number. The prosecution appealed against the verdict but the Supreme Court subsequently upheld the district court's verdict ('Indonesia Court Rejects Activist Murder Case Appeal,' *Reuters*, July 10, 2009, available at: <http://in.reuters.com/article/worldNews/idINIndia-40952220090710>).

nie Surowidjojo, another elite Jakarta law firm, founded PSHK (Center for Law & Policy Studies).²⁴ They were joined by a name partner at the firm, Arief Surowidjojo.²⁵ PSHK sees its goal as the establishment of a constitutional state (Widjaja 2003: 416). To this end, PSHK has done legal research into the validity of a number of presidential decrees issued during the New Order and President Habibie's brief tenure. Its lobbying efforts of members of the DPR contributed to the rescission of a number of these decrees. PSHK has also inserted itself into the constitutional amendment process relating to the restructuring of the country's political institutions, such as the direct election of the president by the people instead of the MPR (ibid.). Indeed, its success impressed the late Daniel Lev, an American political scientist widely acknowledged for his expertise on the Indonesian legal system, who had characterized PSHK as "a key institution" in Indonesia's legal reform process (ibid. at 423, quoting an e-mail communication from Lev).

The political crisis that followed the financial crisis also spawned another NGO, in January 1999, that is active directly in judicial reform—LeIP (Research & Advocacy Institute for an Independent Judiciary).²⁶ Worried about the issue of judicial independence as well as judicial corruption, YLBHI,²⁷ Ikadin,²⁸ and ICEL²⁹ formed a coalition to establish an NGO that would be dedicated to representing civil society's views in the judicial reform process.³⁰ Buyung Nasution and Mulya Lubis were specifically asked to help launch the new NGO. The group turned to University of Indonesia law-graduate and campus activist, Rifqi Assegaf, to run the new organization. LeIP has been very successful in its structural advocacy work. Under Assegaf's leadership, LeIP has managed to assume an important role in the redesign of the judiciary. It took a leading role in drafting the 'Blueprint' for the Anti-Corruption Court

²⁴ *Pusat Studi Hukum dan Kebijakan*.

²⁵ Interview with Bivitri Susanti, April 15, 2005, in Jakarta. Ms. Susanti was Executive Director of PSHK.

²⁶ *Lembaga Kajian dan Advokasi untuk Independensi Peradilan*.

²⁷ *Yayasan Lembaga Bantuan Hukum Indonesia*, the Indonesian Legal Aid Foundation, was established in 1980 to coordinate the activities of branch offices of the LBH in other Indonesian cities.

²⁸ *Ikatan Advokat Indonesia* (Indonesian Advocates League), established in 1985, was created by Ali Said, Chief Justice of the Supreme Court, as an attempt to unify the various lawyers' associations under one umbrella. It was also an attempt by the government to control the legal profession, particularly Peradin, whose members were obliged to join Ikadin. But control of Ikadin eventually fell to former members of Peradin (Lev 1999: 241-44).

²⁹ The Indonesian Center for Environmental Law was founded in 1993 by a group of lawyers active in the YLBHI.

³⁰ Interview with Rifqi S. Assegaf, April 10, 2007, in Jakarta. Mr. Assegaf was Executive Director of LeIP.

as well as for the Supreme Court. These Blueprints include an analysis of what has gone wrong, in the case of the Supreme Court, and recommendations of the steps needed to bring things around. In the case of the Anti-Corruption Court, LeIP's big contribution was participating in the selection process to insure selection of ad hoc judges who have proved to be unimpeachable in terms of their integrity.³¹

The following year, in March 2000, private lawyers were also instrumental in setting up Hukumonline.com, an online database that features laws and regulations as well as selected court decisions. It also sells premium services that provide subscribers with digests and briefs on general legal developments as well as those affecting specific economic sectors, such as financial services, telecommunications, etc. These services are available in both Indonesian and English.³² Dissemination of legal information, especially of court decisions, will certainly help increase transparency and accountability within the judiciary.

There are many other NGOs geared towards improving law and the legal system. Many are area specific, such as ICEL and WALHI,³³ which are devoted to improving Indonesia's environmental laws. But the NGOs discussed above are the most prominent ones in terms of establishing the *negara hukum* in Indonesia. Private lawyers have been at the forefront of the movement in that they have been instrumental in setting up these NGOs. LBH and Peradin's activism also means that there has been continuity in the struggle from the beginning of the New Order through to *Reformasi*. Not all the same people involved now were involved in the mid-1960s—nearly four decades have passed, after all—but some of the old guard are still around and they have been joined by like-minded people of a younger generation. Private lawyers failed to bring about a liberal vision of the *negara hukum* in the mid- to late-1960s. Will they be more successful in bringing about this fundamental transformation in the legal-political system in Indonesia this time around? The answer would seem to hinge on whether patrimonialism has managed to survive in Indonesia after the fall of the New Order.

³¹ Ibid.

³² See <http://en.hukumonline.com/#>

³³ *Wahana Lingkungan Hidup Indonesia*.

II. Patrimonialism and the Possibility of Institutional Change

As discussed in chapter 2, patrimonialism is best understood as an informal institutional arrangement. There, it was also pointed out, that patrimonialism has deep cultural roots in Indonesia and, indeed, during the pre-colonial Javanese kingdom, dating as far back as the 13th century, it was the *official* mode of governance. During the colonial period, this mode of governance was largely supplanted by a rational-legal bureaucracy. It was to re-emerge as a mode of governance after the conclusion of the revolutionary struggle against the Dutch (Anderson 1972). But because of the Dutch bureaucratic legacy and the inevitable interaction between post-colonial Indonesia and the West, particularly during the New Order when trade and development intervention by Western bilateral and multilateral aid agencies once again became normalized, it was to re-emerge only as an informal institutional arrangement. This informal arrangement competed against the formal rules of rational-legal bureaucracy, eventually supplanting them to become the effective ‘constitution’ by which the elites governed Indonesia.

Many new institutionalists argue that institutions are rules that have been devised cooperatively in response to collective action problems. This is true, in particular, with rational choice institutionalists. Under this theory, self-interested individuals commit themselves to certain rules that allow them to exploit certain resources for their mutual benefit. The agreement to commit themselves is cooperative because everyone benefits, at least in the long run. This does not mean that rational choice institutionalists do not admit that certain individuals may benefit more from certain institutions than others. But they point out that by reducing transaction costs, that is by making it cheaper to exploit resources, for all individuals concerned, those institutions make even the ‘losers’ better off relative to what they had before. For example, by agreeing to give up their royal prerogatives and abide by the decisions of Parliament, the British monarchs of the late 17th century became better able to borrow money from the British propertied classes, in order to fund projects important to the interests of the Crown. Without their royal prerogatives and absolute power, the British monarchs had, in effect, tied their hands and were thus able to make “credible commitments” to repay their debts to the propertied classes who controlled Parliament (North & Weingast 1989). Thus, although the Crown ceded a great deal of political power to Parliament, its interests were subsequently better protected.

But as Moe (2005: 223) pointed out, the British monarchs “fervently *resisted*” (original emphasis) Parliamentary effort to tie their hands and only agreed to do so as a result of “violence and revolution.” The efforts of Charles I (1625-1649) to resist Parliament brought about the English Civil War, which ended only with his execution in January 1649. Continued intransigence by successors to Charles I after the Restoration, in 1660, to Parliamentary control eventually resulted in the ousting of James II in the Glorious Revolution of 1688. Thus, democratic institutions, which “had to be *forced* on the monarchy”, became stable only as a result of long civil war and a revolution (Moe 2005: 223, original emphasis). The whole process took about 46 years to accomplish.³⁴ Moe (ibid.) also pointed out that British democratic institutions at that time benefitted mainly the Crown and the propertied classes. It is doubtful whether they benefitted the nascent working class and the peasantry who were, of course, not party to the bargain. These new institutions were imposed upon the latter two groups of people.

Historical institutionalists, by contrast, have always recognized the issue of power and coercion in the development of institutions (Hall & Taylor 1996). Lately, a number of rational choice institutionalists have also come to recognize the role of power and coercion in the development of institutions (Knight 1992; Levi 1981, 1990; Moe 2005). Seen from this second perspective, institutions are often coercive in that they are imposed by one faction of society upon another, often to the detriment of the latter. In this sense, as Moe (2005: 228) explained, institutions are also “structures of power”. This is particularly true of political institutions where—short of emigration—the exit option is foreclosed. Political losers are thus forced to accept the institutions imposed by political winners. As such, subverting certain types of institutions—especially informal ones—necessarily entails a power struggle; *a fortiori*, one needs to recognize that the creation of new institutions typically takes place during a “process of social conflict” (Robison & Hadiz 2004: 190).

Institutions therefore exhibit a strong “status quo” bias (Pierson 2000). Once in place, institutions are usually very resilient and persistent in a path dependent way.

³⁴ The English Civil War took place from 1642 to 1645 and from 1648 to 1649. In the interim between 1645 and 1648, Parliament had tried to negotiate with Charles I into accepting Parliamentary rule. Charles I, who had been defeated in 1645, refused and civil war resumed in 1648 and ended with his execution in 1649. His son, Charles II succeeded him after the Restoration in 1660. He was, in turn, succeeded by his brother, James II, whose absolutist policies led to his ouster in 1688. Thus it could be argued that stable Parliamentary rule began only with the coronation of William & Mary in 1689 when British monarchs finally and firmly consented to a system of constitutional monarchy.

This is particularly true of informal rules because they have been legitimized by tradition rather than by recent political action, which may or may not be regarded as legitimate. Thus, formal rules are often much easier to change than informal ones. But because institutions typically come as a parcel, what Douglas North (n.d.) calls an “institutional matrix”, of both formal and informal rules, changes to formal rules may take a long time to take effect as informal ones continue to guide people to behave according to older traditional precepts. In the Indonesian context, this may explain why a large number of legislators today are said to be reluctant to enact measures to reform the judiciary or to combat corruption.³⁵

How, then, do institutions change or evolve? North (1990) has argued that institutions change incrementally and in a path dependent manner. Organizations that have sprung up as a result of the incentives produced by institutions have an interest in perpetuating those institutions. Pirates, for example, who have sprung up in response to institutions favoring piracy, will want to perpetuate those institutions and so resist attempts to change those institutions in a radical way. They will permit change only at the margins. The ability of pirates to resist change is, of course, dependent upon their socio-economic and political power. Changed socio-economic and political conditions may weaken or strengthen their power. In the Indonesian context, the power of those who wish to perpetuate the informal institutional arrangement of patrimonialism has, of course, been tempered by the fall of the New Order and the *Reformasi* movement that helped bring about that downfall. But whether it has weakened that power and to what extent is still at issue.

In certain political situations, significant institutional changes can only be brought about by social revolution. In his classic study, *Social Origins of Dictatorship and Democracy* (1966), Barrington Moore, Jr. examined three social revolutions which, he argued, eventually led to the emergence of democracy in Britain, France, and the United States. In each of these cases, Moore identified a bourgeois or capitalist class that acted as the vanguard of fundamental change. The leading role that the bourgeoisie played in their respective revolutions was key to the emergence of democracy. As Moore himself famously said: “No bourgeois, no democracy” (ibid. at 418). The exact route to democracy in these three countries was, of course, different because

³⁵ One pro-reform legislator in the DPR has claimed that between 50 and 80 percent of his colleagues are not interested in judicial reforms (Interview with Benny K. Harman, October 5 and November 7, 2007, in Jakarta. Dr. Harman is a member of President Yudhoyono’s Democrat Party).

each was historically contingent. In Britain, aristocratic interest in commercial agriculture eventually brought the aristocracy into alliance with the emerging bourgeoisie and fused their interests in opposition to the Crown and eventually led to the English Civil War and the execution of Charles I. But the nobility remained strong in England and the monarchy was eventually restored. Although royal intransigence eventually led to the Glorious Revolution of 1688 when James II was ousted, it did not lead to an abolition of royal institutions but led instead to a constitutional monarchy.

In France, the change was deeper and more widespread, which led to the abolition of the monarchy and the establishment of a republican form of government. Successive finance ministers of Louis XVI had not been able to change the dysfunctional tax system, which overburdened the Third Estate, that is, the bourgeoisie. Moore argued that this inability stemmed from “the ‘feudalization’ of a considerable section of the bourgeoisie”—the result of a process in which bourgeois and aristocratic interests were “fused” under the aegis of royal absolutism (ibid. at 109). Moore blamed the sale of aristocratic titles, a practice abolished by Louis XV but reintroduced by Louis XVI, as a significant contributing factor to this process of feudalization. Thus, whereas in England the aristocracy eventually became capitalists, in France the opposite occurred and the bourgeoisie became aristocrats. This feudalization rendered the Third Estate, consisting mainly of the non-ennobled bourgeoisie, politically too weak to sustain the revolution by itself. Bourgeois rule would not have been possible without the violent participation of the peasantry, which led to the destruction not only of the monarchy but also of the nobility.

In the United States, the victory of the Union (the North) over the Confederacy (the South) in the Civil War prevented the emergence of a *latifundia* economy similar to those in many Latin American countries, with “a dominant antidemocratic aristocracy, and a weak and dependent commercial and industrial class, unable and unwilling to push forward toward political democracy” (ibid at 153). Moore argued that with hereditary status as the cornerstone of Southern society, the Northern (and bourgeois) belief in freedom and equal opportunity came to be regarded as “dangerously subversive doctrines” by the South (ibid. at 122). The basic political and economic ethos of the North therefore posed a fundamental threat to one of the most basic institutions of Southern society. Thus, the United States would have been a very different country today had the South won the Civil War or if the North had sought an accommodation with the South.

Germany provides an interesting comparison. There, tensions between industry and labor forced the nascent, and only moderately strong, bourgeoisie to seek an alliance with the Junkers—the landed aristocrats—in an effort to control the workers. Moore argued that absent the move by many Northern workers who went to settle the West, industrial strife could also have characterized the political economy of the North and perhaps have also driven Northern industrialists to seek a reactionary alliance with the Southern “Junkers”. Moore pointed out that had this happened, civil war might have been avoided, but the characteristics of the U.S. political economy would have been completely different. Eventually, an oppressive political system would have resulted.

Although the historical specifics differed greatly in these three countries, there were two common elements—the bourgeoisie and violence. In each case, the bourgeoisie, i.e., the capitalist class, led the revolutionary struggle albeit in alliance with other segments of society. The bourgeoisie fought to advance their class interests. In no small way, these interests were dependent upon the establishment of the rule of law since the struggle had always been to impose limits upon the rule-making authority of kings and, as Moore put it, “to replace arbitrary rules with just and rational ones” (ibid. at 414). In each case, bourgeois rule was made possible only through the sacrifice of blood and treasure because resistance to the fundamental institutional changes sought by the bourgeoisie was determinedly resisted by the old regime.

Although Moore describes these struggles as the fight for democracy, Göran Therborn (1977) was correct in pointing out that democracy—defined as ‘one person, one vote, regardless of status, gender, race, and property qualification’—was not the immediate outcome of these social revolutions. Democracy in this sense was to come only much later; in the British case, almost 240 years later. Instead, what appeared closely on the heels of these social revolutions was constitutionalism. This should not be surprising since constitutionalism was, after all, the new institutional arrangements for which the bourgeoisie had fought. The bourgeoisie did not fight for the introduction of universal suffrage. Indeed, it had no desire to empower the masses even where, as in France, it had been the masses that had helped to catapult the bourgeoisie to power. The lesson here is that it was the emergence of a new elite in these countries—a social class powerful enough and sufficiently determined to impose its dominance upon the state—that ushered in new institutional arrangements that favored its own interests. In Indonesia, it remains to be seen whether the revolutionary potential unleashed

by *Reformasi* brought to the fore a new elite willing and able to impose its political agenda upon the state.

But even social revolution will not insure a clean slate with which to begin institution-building. The new regime can move quickly to change the formal political rules but informal constraints will continue to mitigate against these changes. Rigorous enforcement of the new rules will therefore be necessary. Typically, rigorous enforcement is very costly. *Thus, it is not merely political will that will be required to bring about a complete transformation but also the strong commitment to use scarce political and economic resources.* In Indonesia, as has been made apparent above and as discussed in subsequent parts of this chapter, the political will *is* there on the part of private lawyers, students and large portions of the general population. Since the state is the only organization with sufficient coercive power at its disposal to enforce rigorously the new formal institutions, the issue becomes whether these latter groups have sufficient means to impose their political agenda upon the state. The question of which social class or classes currently control(s) the state in Indonesia is of paramount importance to the issue of judicial reform and the *negara hukum* in general. The expenditure of scarce political and economic resources will be justified only if the new elites, whoever they may be, see failure to establish new institutions that favor the rule of law as a direct threat to their economic interests and hard-won political position. Arguably, then, the expenditure of such resources will only be justified if *Reformasi* constituted a social revolution; that is, it had really been a complete break with the past and not simply a change of regime. Part III is a discussion of this question. A mere regime change would not bode well for an institutional change away from patrimonialism towards the rule of law; at least, not in the short term. The timeline for a path-dependent incremental change that North (1990) talked about would imply a transition of fifty years, perhaps even a century or longer, before any semblance of the rule of law would begin to appear in Indonesia.

III. *Reformasi*: Social Revolution or Mere Regime Change?

The immediate cause of the downfall of Soeharto's New Order was the Asian financial crisis that began to affect Indonesia by mid-1997. The crisis struck first in Thailand in July 1997 when the baht, the Thai currency, took a nosedive. The contagion quickly spread to other countries in East and Southeast Asia, including Indonesia. Many Indonesians, fearing a similar collapse of the rupiah, quickly sought refuge for

their assets in the US dollar, putting severe pressure on the Indonesian currency. From a high of Rp. 2,340 to the US dollar in July 1997, the Indonesian currency fell to Rp. 3,600 by October, to Rp. 6,000 by the end of 1997 and finally to Rp. 17,000 in January 1998 before stabilizing for a while at between Rp. 7,500 and 8,000 by April. The following month it again collapsed to Rp. 10,000 to the US dollar (McLeod 1998: 42). The rupiah lost over 73 percent of its value in less than a year (Goldstein 1998: 2).

The damage to the Indonesian economy was catastrophic. GDP growth plunged from a high of 8 percent annually in 1996 to 1.4 percent by the fourth quarter of 1997 and further to -6.2 percent by the first quarter of 1998 (Lee 1998: 5). Unemployment soared because of the vastly deteriorating economic conditions. In the years preceding the crisis many Indonesian companies—some 800 of them according to O’Rourke (2002: 41)—borrowed heavily from foreign, but also domestic, banks short-term debts denominated mainly in US dollars. The total amount of offshore debt owed by Indonesian companies was about US\$80 billion or “roughly four times greater than BI’s³⁶ gross reserves and many times greater than its liquid reserves” (O’Rourke 2002: 41). With the free-fall of the Rupiah, most Indonesian companies were unable to service their debts, resulting in massive defaults. The socio-economic impact of the defaults was massive lay-offs of workers. By the end of 1997, about a million workers had lost their jobs (Aspinall 2005: 211). In June 1998, ILO and UNDP estimated that by the end of that year, the total number of workers who would lose their jobs would be between 3.8 and 5.4 million (Lee 1998: 40).

The poor in Indonesia were affected not only by the increased unemployment but also by soaring inflation. Data available in 1998 projected an inflation rate of 60 percent as a result of the financial crisis (ibid. at 47). From the perspective of the poor, “the purchasing power of the minimum wage, unchanged between January 1997 and June 1998, . . . could only purchase 2.6 kg of rice in mid-June 1998 compared with 6.3 kg a year and a half” before (ibid., quoting ILO (1998: 39)). It was estimated that about 27.6 million Indonesians would fall into poverty as a result of soaring inflation caused by the crisis. Added to the estimated 12.3 million Indonesians who were forecast to fall into poverty as a result of the increased unemployment, it was predicted that an additional 39.9 million Indonesians—compared to pre-crisis levels—would fall into poverty as a result of the financial crisis (ibid.). Not surprisingly, within a rela-

³⁶ *Bank Indonesia*, Indonesia’s central bank.

tively short period of time, the financial crisis had turned the country into a political tinderbox. Widespread riots soon engulfed the country and turned the financial crisis into a political crisis that eventually brought down Soeharto's government. But was this political crisis the beginnings of a genuine social revolution?

Popular agitation for the resignation of President Soeharto began on the two campuses of the University of Indonesia in Jakarta where, in February, students held mass protests (Aspinall 2005: 221). By March 11, the day after the People's Consultative Assembly (the MPR) had unanimously re-elected Soeharto to his seventh consecutive term as president, mass protests by students were being held in the campuses of most major universities throughout the archipelago. At the prestigious Gajah Mada University in Yogyakarta, Central Java, for example, up to 30 thousand students had held demonstrations in one day, protesting against the soaring inflation that made tuition, among other things, increasingly difficult to pay for many students. They demanded Soeharto's resignation, an end to KKN, and *Reformasi* in the country's socioeconomic and political systems (ibid.). As time progressed, these protests turned increasingly violent as some of the more radical student factions attempted to take the demonstrations off-campus where they were quickly met by stiff resistance from the police and members of the military. Kopassus, the special forces in the military, under the command of Maj.-Gen. Prabowo Subianto—Soeharto's son-in-law—allegedly went so far as to kidnap a number of student activists.³⁷

Meanwhile, the student protests had begun to receive the support of a broad segment of the middle class. Eventually, members of the poorer classes—residents of Indonesia's urban villages (*kampung*'s)—also joined the students and began to clash against the police and the military (Aspinall 2005: 231). By mid-May, the violence had taken a turn for the worse. On May 12, four students from Jakarta's Trisakti University were shot and killed by security forces attempting to stop the students from taking their protests off-campus (Kingsbury 2005: 270). The killings unleashed widespread rioting in Jakarta and in Solo, a city of about 600,000 people in Central Java, situated close to Yogyakarta. For two days after the Trisakti killings, on May 13 and 14, mobs rioted in Jakarta—looting, robbing, assaulting, and raping. The victims of the violence were mostly Chinese-Indonesians. Comprising of only 4 percent of the Indonesian population, the Chinese-Indonesians controlled over 70 percent of the

³⁷ *Asiaweek*, March 3, 2000, vol. 26, no. 8.

country's wealth. Some Indonesian politicians had publicly blamed the Chinese-Indonesians for the financial crisis. As owners of supermarkets and other stores selling food and other basic necessities, they were fingered as those responsible for the sky-rocketing prices of these essential commodities.

The riots caused massive damage to commercial properties amounting to more than US\$1 billion and the death of well over 1,000 people, most of whom died when they were trapped in burning buildings while in the process of looting stores located in them (Aspinall 2005: 233). On May 18 and 19, thousands of students occupied the building that housed the DPR (the People's Representative Council), the country's legislature. Photographs taken of the students "swarming over the building" were to "become an iconic image of *Reformasi*" (ibid.). In two provincial capitals—Yogyakarta and Bandung—demonstrations, each consisting of over 500 thousand students and non-students, converged in the city centers. Smaller demonstrations consisting of tens of thousands students and non-students also took place in many other cities (ibid.).

With such a widespread upsurge of popular sentiment demanding Soeharto's resignation, the elites finally withdrew their support for the dictator. On May 18, Harmoko, Speaker of the DPR and firm Soeharto loyalist who less than two weeks before had confirmed Soeharto's re-election in the MPR, urged Soeharto to resign. Two days later, Harmoko went further and gave Soeharto three days in which to resign or face impeachment proceedings (Aspinall 2005: 233). On the evening of the 20th, three of Soeharto's former vice presidents visited him and urged him to resign (Kingsbury 2005: 271). After General Wiranto, commander-in-chief of the Indonesian armed forces, also visited him later that same evening, Soeharto finally relented and informed B.J. Habibie, his then-current vice president, that he was resigning the following day, May 21st (ibid.).

The riots and violence, along with the widespread destruction of property, immediately preceding his resignation had, as Aspinall has pointed out, raised the cost of governing (Aspinall 2005: 234). Harmoko himself, for example, had personally fallen victim to the riots when mobs burned down his house in Solo. Not surprisingly, not many within the elites were prepared to tempt the mood of the mobs by publicly appearing to support the President. Unless the army were prepared to resort to the 'Tiananmen' solution of gunning down hundreds—possibly thousands—of students, the choice was simple: Soeharto had to go. The economic crisis had eroded much of the regime's legitimacy. The New Order had justified authoritarian rule as a necessary

adjunct to economic development. As long as Indonesia maintained the GDP growth that once characterized it as an ‘emerging tiger economy’, most of the people were content to give Soeharto the leeway he demanded. But with the economy in tatters as a result of the financial crisis, Soeharto had lost an important source of legitimacy. Political disorder, as evidenced by the riots, also reduced the regime’s legitimacy because of the claim that only New Order authoritarianism could keep political chaos and lawlessness at bay (*ibid.*).

The political crisis brought about by the financial crisis certainly acted as the catalyst that brought down New Order rule after 32 years in power. But was it a crisis that precipitated a social revolution? Or did the political elites merely use the crisis as a means to hasten the departure of an elderly dictator—he was 73 at the start of the financial crisis—with whom they were growing increasingly discontented? Sources of opposition outside the regime were many, but largely inchoate. Their failure to unite behind a single agenda rendered them largely and repeatedly ineffective at bringing about meaningful change prior to the crisis. Inside the regime, on the other hand, the unresolved question of an orderly succession was causing anxiety among the political elites. There was no question of an outright coup, but there were clear indications that many among the political elites, including high-ranking military officers, were jostling to position themselves as possible successors to Soeharto in the years preceding the financial crisis. Thus, a power struggle was already under way when the financial crisis hit the country in 1997.

To many among the elites, Soeharto was fast becoming a political liability. Towards the end of his rule, Soeharto had become increasingly tetchy and erratic in his day-to-day conduct of the government. He had also grown increasingly blind to the grossly predatory conduct of his children. Many within the elites believed that the children’s unrestrained corruption could eventually prove disastrous for the country’s economy. In 1988, General Benny Moerdani, a Soeharto loyalist and the then-commander-in-chief of Indonesia’s armed forces, was moved to advise Soeharto to consider “limiting his children’s questionable business activities” (Kingsbury 1998: 201). Instead of heeding Moerdani’s advice, Soeharto fired him from his position as the armed forces’ chief and thereafter quickly sidelined him from the government. General Moerdani’s dismissal eventually caused a rift in the army between those who supported Moerdani’s position and saw a clear need for new leadership within the re-

gime—the ‘red-white’ faction, so-called because of its secular nationalist stance³⁸—and those who supported Soeharto—the ‘green’ faction, so-called because of the group’s pro-Islamist stance.

Moerdani never publicly resurfaced on Indonesia’s political center stage but remained influential among a younger generation of like-minded officers. The public face of the red-white faction was assumed instead by General Wiranto whose meteoric rise through the ranks culminated with his appointment as the armed forces chief in February 1998. Another high-ranking officer prominent in this group was Lt.-Gen. Susilo Bambang Yudhoyono—who eventually became Indonesia’s sixth president in 2004. These officers had a powerful base within the armed forces and strong connections among the political elites (Kingsbury 2005: 261). Although it saw increasing urgency in resolving the succession question, the faction did not favor the idea of deposing Soeharto through a coup. Indeed, in certain ways, the red-white faction remained loyal to Soeharto while, at the same time, maneuvering to arrange his succession. General Wiranto, for example, continued to maintain close relationships with Soeharto despite his involvement with the red-white faction (ibid. at 262). Soeharto had enough trust in Wiranto to appoint him commander-in-chief of the armed forces in 1998. In many ways, the red-white faction simply wanted an orderly succession that the army could control (Kingsbury 2005: 256). To this end, the faction began to manipulate the political process in Indonesia.

Politically, things had begun to change by the early 1990s when popular support behind Megawati Soekarnoputri, leader of the PDI (Indonesian Democratic Party) and daughter of Indonesia’s first president whom Soeharto had unseated in 1966, made her a potential challenger for Indonesia’s presidency. Prior to this, Soeharto had always been re-elected unopposed by the MPR. Her possible candidacy was therefore unprecedented and “would have introduced a new element of contestation” that “had the potential to force a dramatic opening of the political system” (Aspinall 2005:182). Megawati’s popular appeal derived mainly from her father’s image as a defender of the ‘little people.’ With his Marxist rhetoric about social justice, Soekarno was popularly perceived—in the words of a well-known Indonesian novelist, Pramoedya Ananta Toer—as having given “dignity to the downtrodden and anxiety to the powerful”.³⁹

³⁸ Indonesia’s national flag is red and white in color.

³⁹ *Time*, August 23-30, 1999, vol. 154 no. 7/8.

The red-white faction saw that Megawati's popular appeal made her attractive as a possible successor to Soeharto and began to lend support for her possible candidacy. For example, Maj.-Gen. Yunus Yosfiah, commander of the armed forces staff college between 1995 and 1997, invited Megawati to deliver an address at the college (Kingsbury 2005: 263). After Megawati had been elected chairman of the PDI, Maj.-Gen. Abdullah Hendropriyono, commander of the Jakarta Garrison, posed for a photograph with her. As Kingsbury (*ibid.* at 259) pointed out, "[i]n a country where symbolism is important, their posing together for the photograph was seen as a clear sign of the red and white faction's support." Such a move, given Soeharto's dislike of Megawati, was also a very public showing of these officers' defiance against the President.

Megawati appealed to the red-white faction because, despite her popular appeal, she was an established member of the political elite and had "articulated no clear platform of democratic change" (Aspinall 2005: 182). Under Megawati, these generals reasonably believed, it was remote that any really radical change would take place that would disturb the armed forces' role in Indonesian politics. In this, they turned out to be prescient.

Thus, although she was popularly perceived as having democratic credentials, Megawati was really more a political personality defined by the generals who had helped boost her political career. It was to these generals that she owed her allegiance and not to the 'little people' who supported her candidacy. When she did become president in 2001, some of these generals were justly rewarded. Maj.-Gen. Hendropriyono, for example, was elevated to a cabinet-level position as chief of BIN, the National Intelligence Agency (Kingsbury 2005: 263).

Political intrigues by the red-white faction of the army were not limited to its support for Megawati. Conventional wisdom said that the surest route to the presidency was through the office of the vice president. In 1993, acting behind the scenes, General Moerdani engineered the election of General Try Sutrisno as vice president. Sutrisno had replaced Moerdani in 1988 as commander-in-chief of the armed forces and had served in that position until 1993. The military faction in the MPR nominated Sutrisno for the vice presidency without consulting Soeharto. The move was believed to have been an effort to pre-empt Soeharto from selecting B.J. Habibie, a favorite of the president but highly disliked by the red-white faction, as his running mate (Kingsbury 2005: 257). Outfoxed, Soeharto could not prevent the MPR from confirming Su-

trisno as his vice president. The red-white faction tried once again to influence the MPR to re-elect Sutrisno as vice president in 1998. But in 1997, Soeharto had installed Harmoko as speaker of the DPR/MPR and coupled that appointment with the appointment of Syarwan Hamid, another Soeharto loyalist, as head of the army faction in the DPR/MPR. These appointments insured that Soeharto got to pick his own running mate. In 1998, the MPR elected Soeharto as president and B.J. Habibie as his vice president.

Meanwhile, those officers more loyal to Soeharto—the green faction—were also maneuvering to secure a succession by moving ever closer to the President. But the leader of this faction—General Feisal Tanjung, who became commander-in-chief of the armed forces in 1993—was not a popular officer within the army and had little in common with many of his fellow officers (*ibid.* at 260). Being a Soeharto man, Tanjung was probably perceived as being more loyal to the president than to the army as an institution. He therefore had very little influence among his fellow officers. Lt.-Gen. Prabowo Subianto, Soeharto's son-in-law, was another 'green' general. Like Tanjung, he was also seen as a Soeharto man whose career was largely influenced by his close association with the first family. Both officers commanded very little loyalty in the army outside the core green faction. Their political connection, moreover, was oriented towards the pro-Islamic forces and, in particular to B.J. Habibie, minister of technology & research, who was popular neither with broad segments of the armed forces nor with many of his fellow ministers.

As the financial crisis turned increasingly into a political crisis, these two factions diverged in their support of Soeharto. Prabowo, who had by this time been given command of Kostrad, the Army's Strategic Reserve Command, reacted with force against the student demonstrators. Although Prabowo went on to deny any responsibility in the Trisakti shootings, the deaths have been most often attributed to him. These 'green' officers were quite prepared to implement the 'Tiananmen' solution to defend Soeharto's presidency (Aspinall 2005: 236). But Wiranto, as commander-in-chief of the armed forces, vetoed this option. By doing so, Wiranto had given the army's tacit support to the students. Wiranto even ordered the Marines guarding the MPR not to move against the students occupying the building. His actions, or perhaps inaction, against the students effectively put in motion Soeharto's eventual departure.

Although Wiranto's red-white faction did not get along with B.J. Habibie, Wiranto decided to support Habibie when the latter ascended to the presidency upon

Soeharto's resignation. For doing so, Habibie rewarded Wiranto by reappointing him as commander-in-chief of the armed forces as well as defense minister in his cabinet. Wiranto moved quickly to dismiss Prabowo from his command of Kostrad and eventually out of the army. Wiranto also replaced all of Prabowo's military supporters with red-white officers. He especially took care to dismiss Maj.-Gen. Muchdi Purwopranjono, commanding officer of Kopassus, the army's special forces unit. By doing so, Wiranto made sure that his red-white faction controlled of the army. Kingsbury (2005: 262, 272) argued that, through his maneuverings, Wiranto had also gained control of Habibie's cabinet and that for "the period from just before Suharto's resignation until February 2000, Wiranto was probably the most powerful single individual in Indonesia."

The political crisis brought on by the financial crisis was certainly instrumental in bringing about Soeharto's downfall. Had there been no political crisis, it is clear that the regime would not have fallen when it did. On the other hand, the student-led popular uprising would most probably not have been successful had the military taken a violent stance against the demonstrators. That it did not was the result of a rift in the armed forces which left only a relatively weak minority of officers willing to resort to the 'Tiananmen' solution to defend the regime. The red-white faction in the army certainly used the political crisis to obtain its goal of hastening Soeharto's departure. In the final analysis, it was their decision to give tacit support to the uprising that was key to the regime's downfall. It is therefore difficult to conclude that Soeharto's regime was brought down by a social revolution. How the regime actually fell was to have real consequences for the way that change would come about during *Reformasi* because it was clear that the military and the political elites had a very different agenda of change from the popular movement they tacitly supported. That agenda was squarely aimed at maintaining the informal institutional status quo.

IV. *Reformasi* and the *Negara Hukum*

The path towards *Reformasi* insured that the agenda for change was not wholly within the control of those who wanted radical change or *Reformasi Total*. But the expression of political dissent had been loud enough and violent enough to insure significant changes in Indonesia. Moreover, it would be wrong to suppose that the armed forces survived the political crisis with its legitimacy intact. The Trisakti shootings and other brutal measures of repression, carried out mainly by the army's 'green' fac-

tion, had tainted the armed forces as a whole in the eyes of the public. Many called for and eventually got the elimination of *Dwifungsi*, the institutionalized rationalization by which the armed forces justified its involvement in Indonesian politics through direct representation in the DPR/MPR. In addition, President Habibie's weak political position meant that he had to make many concessions to reformers. Harold Crouch (1999: 135) pointed out that Habibie

lacked a strong political base and quickly attempted to create a liberal, democratic image for himself. Political prisoners were released, the law restricting the number of political parties was effectively abolished, a timetable for elections was announced, and constraints on the press and other media were largely removed.

Habibie's presidency was seen by many as illegitimate. His moves to liberalize the political system can therefore be explained as a strategy to bolster his political position both domestically and internationally. As Crouch (*ibid.*) has put it:

As it is unlikely that Habibie had really been a closet liberal who had been waiting all these years to reveal his true self, the more likely explanation was that the new liberal approach was needed to attract domestic support and also, most crucially given the state of the economy, to win international—especially American—approval.

Habibie also heeded calls for the restoration of the *negara hukum*—the rule-of-law state. As in the mid-1960s, the calls were specifically for abolishing the system of dual court administration, discussed in chapter 2, whereby the financial and personnel management of the lower courts were handled by the Minister of Justice rather than by the Supreme Court. As discussed in chapter 2, abuse of the system of dual court administration under the New Order had effectively made the judiciary politically dependent on the government and led to its dysfunctionality. Supporters of the *negara hukum* wanted the administration of the judiciary to be brought under one roof (or *satu atap*). They also called for the judiciary to be given the power to review legislation for its constitutionality. This too had been a demand of reformers in the mid-1960s (Lev 1978).

By presidential decree,⁴⁰ Habibie instructed his minister of justice, Prof. Dr. H. Muladi, to establish and chair a committee of experts to explore the issues of *satu atap* and constitutional review of legislation. Following the recommendation of this committee, whose members included famous human rights lawyer, Adnan Buyung Nasution, Habibie pressured the DPR to enact legislation to implement *satu atap* and constitutional review. Benny Harman, a Partai Demokrat member of the DPR, explained

⁴⁰ Keppres No. 21/1999.

that at that time, the composition of the DPR still reflected the reality of the New Order—Golkar and the military faction still had a controlling majority. Habibie received no opposition from Golkar, his own political party. Weakened politically, the military faction in the DPR had little option but to accept *satu atap* and constitutional review. The PDI and the PPP, the only other political parties in the DPR at that time had always favored *satu atap* and constitutional review and so offered no opposition.⁴¹ So, despite being politically weak, Habibie managed to bring about the enactment of Law No. 35/1999, which provided for the transfer of financial and personnel management responsibilities of the lower courts from the Department of Justice to the Supreme Court. However, as Firmansyah Arifin—executive director of KRHN—noted, Law No. 35/1999 merely amended Law No. 14/1970. Actual implementation of the move of these management responsibilities was left to subsequent legislation.⁴² It was not until the passage of Law No. 4/2004 in January 2004 that the actual transfer was made.

Constitutional review proved to be a more complicated matter, although the principle of constitutional review had been accepted. The important issue was who was going to adjudicate the constitutionality of statutes? Was it to be the Supreme Court or some new and independent institution especially created for the purpose? The various political parties and factions in the DPR/MPR were split on this issue. Golkar and the military faction had no interest in creating a new and independent court to decide constitutional issues. The military favored giving the job to the Supreme Court which, given its history of political co-optation and corruption, could very probably be counted on to serve the military's interest (Hendrianto 2010). Golkar took the extreme position that having either the Supreme Court or a special court decide constitutional issues would violate Indonesia's separation of powers doctrine, which holds that all three branches of government—the executive, legislature and judiciary—were co-equal. Under the doctrine, Golkar argued, it would be improper for one branch to have review powers over another. Therefore, Golkar proposed that constitutional review powers be vested in the MPR, which, in the Indonesian system, theoretically stands above the other three (ibid.). Megawati's party, which had been renamed PDI-P (Indonesian Democratic Party of Struggle), was split on the issue. As a party, it had no interest in creating a new and independent court and sided with the military in advocating that constitutional review powers be vested in the Supreme Court. A small faction

⁴¹ Interview with Benny K. Harman, October 5 and November 7, 2007, in Jakarta.

⁴² Interview with Firmansyah Arifin, May 25 and October 2, 2007, in Jakarta.

of the PDI-P, however, sided with smaller parties that favored creating a special court while another faction sided with Golkar in favoring the MPR as the proper venue for constitutional adjudication (ibid). No consensus was reached throughout 2000 and most of 2001. Eventually, a compromise was reached whereby a new court—the Constitutional Court—would be established to review only acts of the DPR, but not regulations. Judicial review of regulations to determine their compatibility with the relevant statutes would remain within the purview of the Supreme Court (ibid.).

On January 9, 2001, the 1945 Constitution was revised for the third time to provide, *inter alia*, for the creation of a Constitutional Court.⁴³ Under the amended constitution, the president, the DPR, and the Supreme Court were to select three each of the nine justices of the Constitutional Court.⁴⁴ But, as with *satu atap*, the Constitutional Court could not be established until the passage of an enabling legislation. To avoid excessive foot-dragging, the 1945 Constitution was amended for the fourth time on August 11, 2002, to include three Transitional Provisions, one of which⁴⁵ provided that the Constitutional Court had to be established by August 17, 2003. Until such time, the powers of constitutional review were to be vested in the Supreme Court. The DPR eventually enacted Law No. 24/ 2003 on August 13, 2003. The Court itself began life three days later on August 16, 2003—one day ahead of schedule.

Reformasi did indeed manage to usher in two major changes to the constitutional fabric in Indonesia.⁴⁶ Based strictly upon appearances, these changes have established a constitutional mode of governance in Indonesia away from patrimonialism—this would represent a huge and fundamental shift in Indonesian politics. But appearances can be deceiving. Does judicial independence really exist in the post-Soeharto era? Is there really constitutional review in the sense of *Marbury v. Madison*,⁴⁷ the famous U.S. Supreme Court case that established the U.S. judiciary's right to review legislation for its constitutionality? These questions will be dealt with fully in chapters 4 and 5, respectively.

However, it may be instructive to make a couple of observations at this point about the directions which political change in post-Soeharto Indonesia is taking. First,

⁴³ Articles 24(2) and 24C(1)-(6).

⁴⁴ Article 24C(3).

⁴⁵ Article III.

⁴⁶ Technically, *satu atap* was a legislative change but its import was as much constitutional as the powers of constitutional review.

⁴⁷ 5 U.S. 137 (1803).

many of the elite personalities of the New Order have survived the downfall of the regime. For example, Ginanjar Kartasasmita, whom Dan Slater (2004: 78) has called an “über-crony”, became a member of the DPD (the Regional Representatives Council),⁴⁸ the upper house of the Indonesian parliament, created as part of political reform process. The political party of the New Order also survived. Golkar, Soeharto’s political vehicle in the DPR/MPR, now has a strong presence in the legislature. Indeed, after the 2004 election, Golkar had the largest number of seats in the DPR. Moreover, many of Soeharto’s cronies, although not all, have also survived the regime change largely unscathed. Many conglomerates that thrived on Soeharto’s patronage during the New Order are still standing today, including a number that are controlled by Soeharto’s children. These conglomerates remain important players in Indonesia’s economy today.

Second, it would appear that government policy-making remains insulated from popular participation despite the re-introduction of fair and free elections. Slater presents an interesting analysis of the cartelization of Indonesia’s political parties. Borrowing from the theory of oligopolies, Slater (ibid. at 62) argued that political parties “*share* power far more than they *fight* over it” (original emphasis). Parties cooperate with rather than compete against each other. They do so with a view to capturing the government departments, the gate-keeping institutions that are the sources of patronage. It started with the administration of President Abdurrahman Wahid, Indonesia’s fourth president. At that time, the president was still elected, following the rules established by the 1945 Constitution, by the MPR.⁴⁹ Wahid became president even though his party, the PKB, the National Awakening Party,⁵⁰ had received just a little over 12 percent of the seats in the DPR behind both Golkar (over 22 percent) and the PDI-P⁵¹ (over 33 percent), the party led by Megawati Soekarnoputri, after the 1999 general elections. By rights, therefore, Megawati had the more legitimate claim to the presidency by virtue of her party’s standing in the DPR/MPR. But Wahid was elected instead—because of cultural and religious predispositions against having a woman president—with the help of the other major parties. As *quid pro quo* Wahid was obliged to offer members of *all* the major parties in the DPR a seat in his cabinet.

⁴⁸ *Dewan Perwakilan Daerah*.

⁴⁹ At that time, the MPR was composed of the members of the DPR as well as representatives of functional groups, such as the military, and the regions.

⁵⁰ *Partai Kebangkitan Bangsa*.

⁵¹ *Partai Demokrasi Indonesia—Perjuangan*.

According to Slater, this National Unity Cabinet became the key to the re-establishment of patrimonial politics in Indonesia. The agreement allowed each party the opportunity of “playing a gate-keeping role in regulating particularly *basah*⁵² sectors such as finance, energy, industry, transportation, and state-owned enterprises” which “invest ministers with potentially valuable personal authority over the commanding heights of the national economy” (Slater 2004: 67). Slater (ibid.) pointed out that even the “comparatively *kering* (dry) . . . Department of Religion[] has been reputed to be highly lucrative for its ministers. The trick: to skim the interest from the mandatory deposits of those preparing to perform the *hadj*”⁵³ (ibid.). This arrangement, however, made Wahid feel particularly hamstrung in his ability to govern as he saw fit. He rebelled against it and reneged on his agreement by replacing 26 of his 35-member cabinet with his own people in August 2000. In retaliation, the parties cooperated to bring successful impeachment proceedings against him in the MPR on July 23, 2001. He was immediately replaced by Megawati as president.

Megawati’s presidency proved to be a reconstitution of the party cartel that remained stable until the end of her term in 2004. Two things occurred to upset the delicate balance: one, the third amendment to the 1945 Constitution on November 9, 2001, that provided for the popular election of the president⁵⁴ and, two, a split between Megawati and her coordinating minister of politics & security, Susilo Bambang Yudhoyono. Popular election of the president would put that person in a much stronger bargaining position vis-à-vis the DPR. The president would no longer be beholden to the DPR/MPR for his/her election. Moreover, the third amendment also made impeachment of the president more difficult to orchestrate.⁵⁵ But, Slater (2006: 7-9) argued, popular election of the president may not have mattered much to the party cartel if there had not been a split between Megawati and Yudhoyono. Without Yudhoyono, Megawati would have probably won re-election because of the close cooperation that had developed between the PDI-P and Golkar during her presidency. Witness the fact that after Wiranto, Golkar’s presidential candidate, was eliminated in the first round of voting, Golkar had supported Megawati’s presidency. Slater (2006: 7-9) argued that Megawati’s re-election would have assured the continuity of the party cartel. Even if

⁵² *Basah* is the Indonesian word for ‘wet’. In this context, a government portfolio that is *basah*, as already pointed out above, allows for a great possibility for rent-seeking activities.

⁵³ The *hadj* is the pilgrimage to Mecca that every Muslim is encouraged to make.

⁵⁴ Article 6A(1).

⁵⁵ Articles 7A and 7B.

Megawati had lost, without Yudhoyono in play, Wiranto would have probably won the presidency.

Slater's main point is that like any other oligopoly, Indonesia's party cartel was unresponsive to the consumers, in this case, Indonesia's electorate. The cartel could afford to do so because there was no real political competition. Each individual party could lose the support of the electorate, but as long as it did not disappear completely, it could still be guaranteed a seat in the presidential cabinet. As a result of the cartel, political parties in post-Soeharto Indonesia could not be held accountable by the electorate. Slater (*ibid.*) argued that since the election of Yudhoyono, the cartel has been "disrupted" but not "destroyed." This is true because Yudhoyono himself is an insider who had helped to "shap[e] elite collusion" (*ibid.* at 9, fn 19). In Yudhoyono's United Indonesia Cabinet, every major political party—except the PDI-P—has found a seat. If there were to be a reconciliation between Megawati and Yudhoyono, the cartel would automatically be reconstituted. For a while, the presence of non-party technocrats in Yudhoyono's cabinet, like Finance Minister Sri Mulyani Indrawati, made it unclear whether a party cartel has been re-established. But Sri Mulyani has since resigned from the cabinet to take up a managing directorship at the World Bank.

It is widely believed that Sri Mulyani's abrupt departure was engineered by Aburizal Bakrie, billionaire businessman of the old school and chairman of Golkar since 2009. A number of Bakrie's companies had become the target of Sri Mulyani's effort to reform the Tax Directorate under the purview of her Finance Ministry and to raise tax revenues for the government. It was alleged that a number of Bakrie companies had evaded paying about US\$227 million in taxes.⁵⁶ Allegedly, in an effort to fight back, Bakrie then orchestrated a "fierce campaign" against Sri Mulyani and Vice President Boediono, another internationally respected technocrat, charging them with corruption in the bailout of Bank Century during the 2008 economic recession.⁵⁷ As finance minister, Sri Mulyani along with Boediono, who was then governor of Bank Indonesia, had authorized the bailout, which turned out to have been substantially

⁵⁶ 'Indonesia without Sri Mulyani,' *Asia Sentinel*, May 31, 2010. Successful prosecution of Gayus Tambunan, a mid-level bureaucrat in the Tax Directorate, shows that there may be some substance to these allegations. Tambunan testified that he had accepted over US\$2 million in bribes from a number of Bakrie companies in return for helping the companies avoid paying taxes. During his sentencing, Tambunan qualified his testimony by saying that he had been urged by the Judicial Mafia Eradication Taskforce to finger Bakrie's companies ('Gayus Blasts Taskforce; SBY Upset,' *The Jakarta Post*, January 20, 2011). The investigation against Bakrie's companies has so far not been pursued.

⁵⁷ Donald K. Emmerson, 'Ruling Coalition May Be on Path to Graft After Reformer Sri Mulyani's Departure,' *The Jakarta Globe*, May 11, 2010.

larger than first indicated. The Bank Century scandal eventually jeopardized the stability of Yudhoyono's coalition government, with Golkar and the Islamist PKS threatening to withdraw. Donald Emmerson, a prominent commentator on Indonesian affairs, said that given what has been revealed in the news, it was "impossible to rule out that she was sacrificed for the sake of a restoration of political comity between Yudhoyono and his opponents."⁵⁸

On May 6, 2010, a day after Sri Mulyani announced her resignation, Yudhoyono announced the formation of "The Coalition's Joint Secretariat" tasked among other things with helping to formulate government policy. This secretariat, it was announced, would be led by Aburizal Bakrie.⁵⁹ It would seem that cooperation among the parties within the governing coalition has become tighter than ever. The PDI-P remains outside the coalition but Taufiq Kiemas, an influential member of the party and husband of Megawati Soekarnoputri, was elected to the chairmanship of the MPR with Yudhoyono's cooperation. Recently, Puan Maharani, Megawati's daughter and another influential PDI-P member, has also voiced a desire to join the coalition.⁶⁰ Although Boediono remains vice president in the cabinet, it is unclear to what extent he can influence things since he has no specific portfolio. In addition, Boediono is under constant threat of impeachment, particularly since the Constitutional Court's recent decision to lower the threshold requirement for impeachment.⁶¹ Moreover, Boediono remains the DPR's target in its politically-motivated investigation of the Bank Century scandal. It is not inconceivable that Boediono, too, may be sacrificed in the same way as Sri Mulyani if Yudhoyono's coalition partners demand it in exchange for peace and harmony within the governing coalition.

V. Conclusion

The *negara hukum* that lawyers and activists sought to establish in Indonesia after the downfall of the New Order was nothing less than a constitutional democracy, in which the judiciary was to play an important role in restraining the power of the executive and the legislature. Such a political order provided a stark contrast to the politics of patrimonialism that had prevailed throughout Guided Democracy and the New

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ 'PDI-P in Talks on Joining Indonesian Government Coalition,' *The Jakarta Globe*, October 16, 2010.

⁶¹ 'Boediono brushes off threat of impeachment,' *The Jakarta Post*, January 15, 2011.

Order. In place of the rule of discretion that had prevailed under the previous regimes, they sought to install the rule of law. The change that lawyers and activists sought to bring about was therefore both fundamental and radical.

History has shown that a fundamental and radical reordering of society's basic institutional framework has typically required a social revolution. Institutions, particularly informal institutions, have a strong "status quo" bias (Pierson 2000) and are therefore persistent and resilient. Moreover, institutions are also "structures of power" (Moe 2005). Those who benefit will inevitably seek to perpetuate them. To change them has historically involved a power struggle, with the attendant bloodshed and expenditure of treasure. This chapter has explored the question whether the *Reformasi* movement that helped bring down the New Order constituted such a social revolution. To this end, the chapter has discussed in detail the political machinations that led to the regime's downfall. Unfortunately, the facts indicate that the fall of the New Order was more likely to have been engineered by members of the elite anxious to bring about an orderly transition from Soeharto to an acceptable successor, while preserving most of the informal institutional framework of his regime. More recent events indicate that many members of the New Order elite still remain in positions of power and influence. This scenario does not bode well for the success of judicial reforms intended to bring about the rule of law and constitutionalism.

But events did not quite entirely transpire as the elite had hoped. The system of dual court administration was abolished in favor of a one-roof system, as the lawyers and activists had wanted in order to bring about judicial independence. Moreover, *Reformasi* also resulted in the creation of the Constitutional Court with the jurisdiction to review legislation for their constitutionality. In the next two chapters, this thesis will explore the extent to which these innovations have met, or fallen short of the expectations, of their champions.

Chapter 4

***Satu Atap* and Judicial Independence: Distinguishing Between Form and Substance**

This chapter discusses a key reform that the reformers discussed in chapter 3 sought to bring about—judicial independence. Until recently, the finances, administration, and recruitment, as well as career development, of trial and appellate judges were under the purview of the Department of Justice, an executive branch department. The Supreme Court, which had the authority to supervise the ‘legal technical’ aspects of the trial and appellate courts, was also administered and had its finances managed by the Department of Justice. In addition, the justices of the Supreme Court owed their promotion to the country’s highest bench to the Department of Justice. This system, as it was practised in Indonesia, clearly compromised the independence of the judiciary, especially in cases where the government was a party or had an interest in the outcome.

After the fall of Soeharto’s regime in May 1998, there was a *successful* call for an end to this arrangement and a reconstitution of the country’s judicial apparatus under one roof or *satu atap*, as it is expressed in Indonesian. But what did reformers mean by ‘independence’? Did they mean simply a judiciary that is independent from political interference? Interviews with key figures in the reform movement suggest that such a narrow definition was unlikely. It was more likely that implicit in the reformers’ call for a one-roof system was the establishment of a court system in which judges would be routinely *capable*—in the sense of competence as well as freedom from *both* political interference and bribery—of deciding cases in a just and logically coherent manner.¹ In other words, reformers were calling for a clean, competent, and independent court system. Whether they managed to establish such a court system in Indonesia is the central question this chapter addresses.

This was not the first time that reformers had called for a one-roof system. A previous generation of reformers had made an identical demand in the mid- to late-1960s during the early days of the New Order. Their efforts were, of course, unsuccessful.

¹ Interviews with: (1) Adnan Buyung Nasution, November 6, 2007, in Jakarta (Dr. Nasution was the founder and first chairman of LBH (*Lembaga Bantuan Hukum* or Legal Aid Foundation)); (2) Benny K. Harman, October 5 and November 7, 2007, in Jakarta (Dr. Harman is Democrat Party member of the DPR); (3) Bambang Wijoyanto, October 23, 2007, in Jakarta (Mr. Wijoyanto was Lecturer in Law at Gajah Mada University (Yogyakarta) and former staff attorney at LBH); and (4) Rifqi Assegaf, April 10, 2007, in Jakarta (Mr. Assegaf was Executive Director of LeIP).

cessful, as the history of the consolidation of authoritarian political power under the New Order showed. In part I, this chapter first addresses the question of why the recent efforts have succeeded and explores how different political circumstances have led to different outcomes. Then, in part II, the chapter looks at a number of recent cases and concludes that subservience on the part of the judiciary to political imperatives is still common, especially in the Supreme Court. It also concludes that the judiciary continues to be corrupt. Thus, the one-roof system does not seem to have succeeded in establishing judicial independence, at least, not in the short term. In part III, the chapter briefly examines each of the presidencies after Habibie to see whether corruption at the political level has begun to diminish and how each of these administrations has acted to advance the reform agenda to bring about judicial independence. The chapter concludes that political corruption has more or less continued unabated and that there has been plenty of foot-dragging in advancing the pace of judicial reforms.

I. Different Circumstances, Different Outcomes

About a week short of five months after Soeharto resigned from the presidency, on November 13, the MPR—the super-legislature responsible every five years for establishing the ‘broad outlines of state policy’²—sought to accommodate demands for political reform by issuing Decree No. 10/1998 (Assegaf 2007). The decree provided for the separation of the three branches of government—the executive, the legislature, and the judiciary—from each other, effectively establishing the groundwork for a system of checks and balances. Unsure of his own political footing, President B.J. Habibie issued his own decree on March 17, 1999 in response to the MPR’s initiative.³ Habibie’s decree established a Joint Working Committee to explore the different ways of implementing the MPR’s decree to separate the judiciary from the executive.⁴ It was on the basis of the Joint Working Committee’s recommendations that the DPR—the legislature—enacted Law No. 35/1999, which Habibie signed on August 31, 1999. This law provided the legal basis for the establishment of the one-roof system when it amended Article 11 of Law No. 14/1970, which had governed the New Order’s system

² *GBHN (Garis-Garis Besar Haluan Negara)*.

³ Presidential Decree No. 21/1999, as amended by Presidential Decree No. 42/1999, dated May 18, 1999.

⁴ *Tim Kerja Terpadu Pengkajian Pelaksanaan Ketetapan Majelis Permusyawaratan Rakyat No. X/MPR/1998 Berkaitan dengan Pemisahan yang Tegas antar Fungsi-Fungsi Yudikatif dari Eksekutif* (Joint Working Committee to Study the Implementation of MPR Decree No. 10/1998 Relating to the Strict Separation of Judicial from Executive Functions).

of dual court administration. One could argue, therefore, that the system of dual court administration effectively died in mid-1999. This was a remarkable achievement—barely over a year after the end of the New Order. In fact, though, the one-roof system did not become *de jure* reality until the passage of a raft of laws in the first half of 2004.⁵ But even by this timetable, it took only a relatively short period of time—a little less than six years after the downfall of Soeharto’s regime—for the central institutional pillar of New Order legality to fall.

This reform success provided a stark contrast to the failure of earlier calls made in the mid- to late-1960s for the establishment of the one-roof system. What accounted for these vastly different results? Briefly, three factors had changed the Indonesian political terrain in the intervening three decades. First, the development paradigm within the IFIs and bilateral aid agencies of the Western powers had changed. As a result of the post-Washington Consensus, there was a great emphasis on institution-building and democracy promotion. The rule of law and judicial independence were central to the development agenda of these organizations. During the 1960s, by contrast, judicial and legal reforms did not form part of the development paradigm. Second, and related to the first, the Cold War had ended, thereby altering the geopolitical priorities of the Western powers and especially those of the United States. Stemming the tide of communism through the fostering of right-wing authoritarian governments in developing countries was no longer a top-priority US foreign policy objective. Instead, the development of free markets and an advocacy of economic deregulation had gained ascendancy over older Cold War objectives. Last, but certainly not least, the domestic political terrain in Indonesia had changed to such an extent as to disfavor the maintenance of authoritarian legal structures in the wake of the pressures for change brought on by *Reformasi*. These factors can be grouped into two sets: first, factors that were external to Indonesian politics and, second, factors that related directly to Indonesia’s domestic political terrain.

A. Soeharto’s New Order, the United States and the Cold War

Calls for the introduction of *satu atap* and the abolition of the system of dual court administration originated as a popular demand for rescinding Law No. 19/1964.

⁵ Law No. 4/2004 (superseded Law No. 35/1999 and Law No. 14/1970 and now controls the powers of the judiciary); Law No. 5/2004 (superseded Law No. 14/1985 and now controls the power of the Supreme Court); Law No. 8/2004 (amended Law No. 2/1986 and now regulates the courts of general jurisdiction); and Law No. 9/2004 (amended Law No. 5/1986 and now regulates the administrative courts).

As noted in chapter 2, this was the law that had permitted Soekarno to intervene into the judicial process whenever it was appropriate, according to his sole discretion, to defend the on-going national revolution and other national interests. It was, as such, the law that ended the increasingly hollow pretense that the separation of powers doctrine formed part of Indonesia's constitutional fabric.⁶ In short, as Daniel Lev (1978: 50) had so elegantly put it, this was the law that “completed the formal patrimonialization of Guided Democracy.”

Had these calls simply demanded the formal restoration of the separation of powers doctrine, it was conceivable that some reform to the system of dual court administration might have been introduced (*ibid.*). After all, Soeharto had sought to legitimize his regime by distinguishing it from Guided Democracy, which had been so contemptuous of constitutionalism and the rule of law. Indeed, many who had initially supported the New Order had done so precisely because of the regime's promises of constitutionalism and the rule of law. Moreover, it was widely accepted at the time that judges typically considered themselves as *pegawai negeri*, that is, as part of a bureaucracy that is “patrimonially associated with political leadership, to whose will it must always be responsive” (*ibid.* at 56). As a group, therefore, judges were politically pliant and posed no threat to Soeharto's regime. Why, then, were calls for *satu atap* rejected if, in conceding it, there was no political downside?

Lev (*ibid.*) argued that the New Order saw calls for *satu atap* in a completely different light—that the regime, in fact, saw a clear political downside to its introduction. The problem was that it had not been only judges who had called for *satu atap*. They were supported in this quest by small but vocal and articulate civil society groups that consisted of lawyers, students, intellectuals with liberal leanings, and business interests not patrimonially tied to the military elite, as well as a number of political parties (*ibid.*). These were the groups that Lev called “political ‘outs’”—people whose very political weakness made a strong and independent judiciary such an apparent necessity. To them, an independent judiciary was their only protection against a government that was becoming increasingly authoritarian. While the judges themselves might have been interested in *satu atap* solely as a means of regaining their status within the bureaucracy, their supporters in civil society clearly saw *satu atap* very differently. *Satu atap*, to them, was the key to imposing constitutional restraints on the

⁶ The separation of powers doctrine had come under increasing attack beginning in 1960 when Soekarno appointed the Chief Justice of the Supreme Court as a member of his cabinet (Pompe 2005: 57-58).

discretionary power of the state. This desire was central to the national debate over the constitutional position of the courts as witnessed by the steady stream of publications on the topics of “private rights” and “restraining political authority” during the latter half of the 1960s (ibid. at 50, fn. 7). It was these repeated calls for change in a new constitutional direction that gave the New Order pause. Seen from this perspective, calls for *satu atap* very definitely constituted a “political struggle” waged by civil society groups “over the way in which state authority [was] conceived and political power [was] exercised” (ibid. at 39). It is important, therefore, to consider carefully the political context in which calls for *satu atap* were made. Lev (ibid.) argued that these demands failed because supporters were only loosely coalesced and often had different political agendas. As a political force, they were obviously weak. This was certainly true. But given different conditions, the contest might have gone the other way. What made it so one-sided was the political strength of the military and of Soeharto himself as well as the geopolitical economy in which both the regime and supporters of *satu atap* found themselves.

1. *Early New Order: Consolidation and Concentration of Political Power*

As pointed out in chapter 2, this political strength first grew out of the failed coup attempt in 1965, led by Lt.-Col. Untung and, allegedly, the Indonesian Communist Party, the PKI.⁷ It gave Soeharto and the army the “pretext”, as John Roosa (2006) had put it, that they needed to deal a fatal blow to the large and well-organized PKI and, in the process, to change dramatically Indonesia’s political landscape. It has been previously discussed that between 1965 and 1966, hundreds of thousands of PKI members were executed while still many more were incarcerated. One estimate placed the total number of those killed and incarcerated at over two million. It was, as Theodore Friend (2003: 114) noted, “a massive and systematic campaign of extermination, suppression, and stigmatization”.

More importantly, this physical decimation of the PKI also opened the way for further consolidation of political power in the hands of the army and of Soeharto himself. Within six months of the aborted coup attempt, Soeharto had effectively sidelined Soekarno from political power. On March 11, 1966, Soeharto’s allies had pressured Soekarno into signing a letter instructing Soeharto “to take all measures considered necessary to guarantee security, calm and stability of the government and the rev-

⁷ *Partai Komunis Indonesia*.

olution” (quoted in Bresnan 1993: 35). Taking this so-called *Supersemar*⁸ as his carte blanche to exercise state power, Soeharto promptly declared the PKI illegal on March 12, 1966. Six days later, he went on to arrest fifteen leftist members of Soekarno’s cabinet, including Soebandrio, Soekarno’s foreign minister (Roosa 2006: 197). Later Soeharto also purged the MPR, the country’s super-legislature, of its PKI and other left-leaning members (Kingsbury 2005: 60). It was this purged MPR that voted on March 12, 1967, to strip Soekarno of his presidency and to elevate Soeharto to replace him, first, as acting president and, less than a year later, on February 28, 1968, as the country’s official president (Bresnan 1993: 42).

Meanwhile, from the last few months of 1965 through to March 1966, Soeharto had also taken steps to purge the armed forces of Soekarno loyalists (Kingsbury 2005: 60). Officers and enlisted men loyal to Soekarno were quickly weeded out and either kicked out or sidelined. Looking after his own political interest over those of the army, Soeharto also sidelined high-ranking officers not otherwise loyal to Soekarno, but whom Soeharto saw as potential adversaries, by posting them to insignificant commands or as ambassadors abroad (Crouch 1978: 236). The branch most quickly and thoroughly purged was the air force since it had thrown its support behind the failed coup attempt. By 1966, the air force had become politically insignificant (*ibid.* at 237). Eventually, the navy and the police force also followed suit, albeit more slowly. It was not until the end of 1969 that Soeharto managed to bring the navy under his control (*ibid.* at 239). As a result of these purges, Soeharto had, for all practical purposes, gained monopoly control over the state’s instruments of coercion.

The civilian bureaucracy was similarly purged of Soekarno loyalists and PKI sympathizers. Thousands of civil servants were dismissed from their posts between 1965 and 1967 (Emmerson 1978: 91). Particularly hard hit were the bureaucrats of the Department of Agriculture since the PKI had been influential in that sector of the economy. As part of the process of taming the bureaucracy, Soeharto began placing military officers in the civil service. Military officers were particularly thick on the ground in subcabinet-level positions of the bureaucracy. The militarization of the bureaucracy was also implemented horizontally to the provinces. Crouch (1972: 213)

⁸ The acronym stands for *Surat Perintah Sebelas Maret* (Letter of Instruction of Eleventh March). The acronym was cleverly “designed to identify Soeharto with [Semar,] one of the most revered figures in the Javanese *wayang*” (Bresnan 1993: 49). Semar’s character is at once humble and powerful and his appearance during a performance of the tale always comes “precisely at midnight, . . . when danger is greatest, the distress of his master deepest, and when help is essential” (*ibid.* quoting Holt 1967).

remarked that by 1968, 68 percent of regional governors were military officers. By the 1970s, civilian governors had become a tiny minority among the regime's top emissaries to the provinces (Emmerson 1978: 103). Further control of the bureaucracy was accomplished through the implementation of corporatist strategies. Civil servants were organized under a single government-controlled union, Korpri.⁹ The structure of this corporatist organization was extremely top-down and was designed "to control and cultivate an utterly reliable civilian apparatus" (ibid. at 108).

In pursuit of his regime's "totalitarian ambition", as Tanter (1990) had put it, Soeharto also employed various means to suppress political dissent. He used Opsus¹⁰—the Special Operations Service he created in 1962 as a combat intelligence unit during the military campaign against the Dutch for control of West Irian (now called West Papua)—for secret political purposes in support of the New Order. For example, Opsus was used for "political lobbying, manipul[ing] elections within political organizations, and . . . organizing the first New Order elections of 1971" (Kingsbury 2005: 59, quoting Lowry 1996). After 1966, Soeharto also resorted to Kopkamtib¹¹—originally created to hunt down members of the PKI who escaped the 1965-1966 destruction of the party—as a means of suppressing political dissent within the New Order by, *inter alia*, granting and withdrawing publishing licences (Crouch 1978: 223). The Kopkamtib commander, as well as his deputies in the regions, had virtually limitless power (Tanter 1990: 230) to interfere in the activities of social and political organizations (Sundhaussen 1978: 64). "In effect," as Tanter (1990: 220) remarked, "Kopkamtib allowed the military to rule under de facto martial law as and when they liked." In 1967, Soeharto added another instrument of political repression to his arsenal when he created BAKIN,¹² a secret police organization reporting directly to him, to spy on political parties, dissidents, and other entities considered a threat to the security of the regime and, when necessary, to carry out "black operations" against them (ibid. at 229). With these instruments of state power at his disposal, Soeharto was quickly able to control and suppress political dissent.

⁹ *Korps Pegawai Republik Indonesia*.

¹⁰ *Operasi Khusus* was "a small state within the state, the aim of which was to promote and protect the New Order's aims using extra-judicial or illegal means if necessary" (Vatikiotis 1993: 30).

¹¹ *Komando Operasi Pemulihan Keamanan dan Ketertiban* (Operational Command for the Restoration of Security and Order).

¹² *Badan Koordinasi Intelijen Negara* (State Intelligence Coordinating Agency).

As a result of the actions he took throughout the latter half of the 1960s, Soeharto had acquired an increasingly secure grip on state power. Despite his promises of constitutionalism and the rule of law, Soeharto was therefore in a position to reject attempts to impose restraints on his exercise of that power. Moreover, as a picture of the true nature of his regime began to unfold, it became apparent that the institutional structure of his power relied heavily on the *rule of discretion*, which therefore had “little room for the institutional restraints that supporters of a *negara hukum* wanted to impose” (Lev 1978: 49). The important point is that any imposition of institutional restraints on his regime depended totally upon Soeharto’s consent, given the opposition’s lack of bargaining power. Reformers were in no position to wrest concessions from the New Order given Soeharto’s almost complete control of political power.

2. *The United States to the Rescue*

Strong though his regime was politically, it could not have survived without outside help, especially from the United States. The problem was the chaotic condition of the Indonesian economy in the mid-1960s. His predecessor’s policies had led the country to the brink of economic disaster. Inflation doubled “every year from 1961 to 1964, increasing sevenfold in 1965, and continuing at the same rate in the early part of 1966” (Bresnan 1993: 56). The country’s budget deficit amounted to 300 percent of government revenue (Kingsbury 1998: 56). The cost of living had skyrocketed during this period; most critically affecting the price of rice, the food staple for the overwhelming majority of Indonesians, which had increased 900 percent in 1965. This type of economic conditions inevitably led to political instability. Had they been allowed to persist, it is doubtful that Soeharto’s regime could have lasted long. Without a stabilized economy, therefore, Soeharto’s hold on political power would have been tenuous at best. It is wholly thanks to Western support, especially US support, that Soeharto managed to bring the Indonesian economy under control. Such help came soon after he ousted Soekarno and arrested a large number of his ministers. With that promising sign of Soeharto’s consolidation of political power, the US government supplied Indonesia with 50,000 tons of rice at preferential prices; 75,000 bales of cotton followed in June, again at preferential prices.¹³ The US government also encouraged its Western

¹³ Memorandum from Dean Rusk, the Secretary of State, to President Lyndon Johnson, dated August 1, 1966, available at <http://www.state.gov/r/pa/ho/frus/johnsonlb/xxvi/4433.htm>.

allies to extend emergency economic aid to Indonesia.¹⁴ Japan, for example, agreed in May to extend emergency credit of \$30 million to Indonesia (Bresnan 1993: 70).

The US government had also quietly assured Soeharto that it would support Indonesia's re-entry into international organizations crucial to its economic recovery, such as the IMF and, particularly, the World Bank.¹⁵ Indonesia had automatically lost its membership in the World Bank when Soekarno pulled the country out of the United Nations. Regaining its membership in the World Bank was, therefore, at the top of Soeharto's economic priorities list. US support proved invaluable. Soeharto's move to invite the IMF and the World Bank to return to Indonesia paid dividends when donor countries decided to extend \$300 million worth of credits "to help 'kick start' the country's ailing economy" in 1966 (Kingsbury 1998: 78). Donors extended a further \$200 million in 1967 (Bresnan 1993: 70).

The US government also quietly promised Soeharto that it would participate in efforts to reschedule Indonesia's massive foreign debts.¹⁶ The US delivered on its assurances in December 1966, when creditors "agreed to a moratorium until 1971 on payments of interest and principal on long-term Indonesian debts incurred before June 1966" (ibid.). There were strings attached to this rescue package. To fulfill his part, Soeharto appointed economists trained in the US and other Western countries to steer his macro-economic policies. He also returned confiscated non-Dutch property (or compensated those who did not want those assets returned) in order to restore investors' confidence and get them to re-invest in Indonesia (Winters 1996: 61). Soeharto's efforts on the economic front brought inflation back under control by the end of 1968 (Bresnan 1993: 71). Clearly, Soeharto had managed to survive politically, in no small measure, due to the help he received from Western countries, especially the US, in stabilizing the Indonesian economy. Why was it important for the US and its Western allies to support Soeharto's New Order?

3. *Indonesia and the Cold War*

To understand US motivation in this regard, one should recall that as Soeharto gained ascendancy over Indonesian politics the Cold War was still raging. Western powers, especially the United States, were busy implementing strategies to counter the

¹⁴ Ibid.

¹⁵ Memorandum from Walt Rostow, Special Assistant for National Security Affairs, to President Lyndon Johnson, dated June 8, 1966, available at <http://www.state.gov/r/pa/ho/frus/johnsonlb/xxvi/4433.htm>.

¹⁶ Rostow memorandum of June 8, 1966.

perceived global spread of communism. As pointed out in chapter 2, it would not have escaped their notice that by the late 1950s the PKI had grown to become the largest communist party in the world that had yet to gain political power (Roosa 2006: 180-81). With Vietnam as the historical focus of the anti-communist struggle in Southeast Asia, it is often easy to forget that Indonesia was, in fact, of far more strategic value to Western interests. Vietnam may have been perceived as the first domino that had to be prevented from falling into communist hands, but it was Indonesia that was widely seen as the “largest domino” that needed safeguarding (*ibid.* at 14).

Indonesia has significant oil as well as liquid petroleum gas deposits. Shell, the giant Dutch oil company, had been actively exploring and drilling for oil in Indonesia since the 1880s. Socony-Vacuum (subsequently known as Mobil Oil) joined the fray in 1897 when it began operations in South Sumatra (AICC n.d.). By 1933, Mobil had entered into a joint venture agreement with Standard Oil of New Jersey (now known as Exxon) to expand their operations in Indonesia, then still known as the Dutch East Indies. Two years earlier, Caltex, a joint venture between Standard Oil of California (subsequently known as Chevron) and The Texas Company (now Texaco), had already begun explorations in Central Sumatra and West Java (Hunter 1971). Indonesian rubber was also important to US economic interests. The United States Rubber Company (now known as Uniroyal) had established the world’s largest rubber plantation in North Sumatra by 1920 (AICC n.d.). In 1935, the Goodyear Tire & Rubber Company followed suit when it established its Indonesian subsidiary.¹⁷ American economic presence continued apace in the Dutch colony and by the end of 1930s, it had become the third most important destination for US direct investment in the Far East (AICC n.d.). Indonesia also had mineral wealth and metal deposits, such as bauxite—the principal ingredient used in the manufacture of aluminum—as well as gold and copper. Indeed, Indonesia’s obvious strategic importance to US economic interest prompted Richard Nixon (1967) to remark that the country had the “richest hoard of natural resources” among Southeast Asian countries, making it “by far the greatest prize in the . . . area” (quoted in Roosa 2006: 15).

Not surprisingly, the PKI’s large and highly-organized presence in Indonesia was of significant concern to successive US administrations during the Cold War.¹⁸ Two factors were to exacerbate these concerns. First, Indonesia’s domestic politics

¹⁷ <http://www.goodyear-indonesia.com/aboutgoodyear.html>.

¹⁸ By 1965, the PKI boasted a membership of 27 million (Friend 2003: 104).

under Soekarno were to heighten US concern about a possible communist takeover of the country. Lacking his own political party, Soekarno did not enjoy much organized support politically (Feith 1963). He therefore depended on the army to maintain political power. But Soekarno realized that relying on the army would also make him politically vulnerable to the very people he depended upon to protect his regime. To secure his position, Soekarno needed a countervailing power source. By virtue of its highly-organized and large presence in Indonesia, the PKI quickly became that source. Consequently, Soekarno began maneuvering to bring the PKI closer into his political orbit, going as far as giving a number of PKI leaders quasi-cabinet positions (ibid.). From the US perspective, this move appeared to put the PKI ever closer to the locus of power in Indonesian politics. Not surprisingly, Soekarno's political maneuverings also antagonized the army's generals and compounded their historically deep-seated antipathy towards the PKI.¹⁹ A clash between the army and the PKI began to look inevitable. Only too aware of its own strategic interests, the US quickly identified the Indonesian military as a potential ally in the struggle against the perceived communist threat. From 1958 onwards, Washington began to implement a strategy of close cooperation between the US government and the Indonesian military (Roosa 2006).

Second, Soekarno's foreign policy objectives also indirectly added fuel to the fire. In 1963, Soebandrio, Soekarno's foreign minister, announced the Indonesian government's policy of *konfrontasi* against the proposed establishment of a newly-independent state called Malaysia. The proposal called for the union of British-controlled Malaya with two other British colonies located on the island of Borneo. Soekarno maintained that Malaysia, despite its nominal independence, would merely be a British proxy and its partial presence on Borneo, whose southern part comprised the Indonesian province of Kalimantan, would constitute a threat to Indonesian sovereignty. It was the PKI's decision to embroil itself in this international conflict that proved incendiary. To gain nationalist credentials, the PKI supported Soekarno's *konfrontasi* policy; moreover, the party had argued for the creation of a "fifth force" of armed peasants and workers to fight alongside the Army, Navy, Air Force, and Police (Crouch 1973). Not surprisingly, this prospect of an armed militia probably under the control of the PKI alarmed not only the US government but also Indonesia's anti-

¹⁹ This deep-seated antipathy had its origins in the so-called Madiun Affair of 1948, during which the PKI attempted a revolutionary take-over of the country. The attempt, crushed by the army, forever colored the view of the Indonesian military towards the PKI.

communist generals. The latter became more convinced than ever of the urgent need to wipe out the PKI's presence from Indonesian politics. To this end, the US government proved to be a strategic partner.²⁰

4. *US Foreign Policy and Modernization Theory*

The US needed no justification for allying itself with a right-wing authoritarian regime. Its stance towards Indonesia was completely consistent with the doctrines of the 'realist' school of US foreign policy that then prevailed. According to its precepts, the conduct of a state towards its own citizens—regardless of how morally dubious that conduct may be—should not be a consideration in the field of international relations (Morgenthau 1948). Thus, meddling in Indonesia's internal politics for idealistic reasons would not have been a serious consideration. The overriding concern at that

²⁰ Looking back at the events that took place in Indonesia in 1965-1966 from today's perspective, it seems clear that the US government actively supported the Indonesian military's campaign to destroy the PKI (Roosa 2006: 195-96). For example, Washington provided Kostrad, under the command of then-Major-General Soeharto, with state-of-the-art telecommunications equipment to help the army better coordinate its campaign against the PKI (ibid.). Washington also provided financial help to an army civilian front involved in the campaign against the PKI (ibid.). In addition, the US Embassy in Jakarta provided the army with a list consisting of the names of "a few thousand" members of the PKI, which dug deeply down to the lower echelons of the party, possibly all the way down to the party's "rank and file" (ibid. at 195, fn 76; Bresnan 1993: 26).

Far less clear, however, is whether the US government had any part in instigating the events that have since been called the 'September 30th Movement'. The Indonesian government's official interpretation of the events put the blame squarely on the PKI, whose members, it was announced, attempted to stage a coup d'état in an effort to seize political power that would allow the party to introduce communist rule to the archipelago. The US government, through its Central Intelligence Agency (CIA), validated this official interpretation when it made public an intelligence report of the events, concluding that PKI leaders had organized the failed coup attempt (CIA 1968). The author of the report, Helen-Louise Hunter, has recently published a book confirming the report's conclusions (Hunter 2007).

But this official version has been disputed by a number of scholars. Anderson & McVey (1971), writing shortly after the events, argued instead that the movement was simply a mutiny of discontented lower-ranking officers—mainly senior field officers, such as colonels—against the Army's General Staff. To the extent that the PKI was involved, it was as "dupes" roped in to lend the rebellion the appearance of a popular movement and, thus, legitimacy. Crouch (1973), on the other hand, argued that the movement was indeed masterminded by the army's senior field officers, like Lt.-Col. Untung and Col. Abdul Latief, but that the PKI had participated as strategic allies and not as the dupes of those officers. Yet another interpretation, proposed by Wertheim (1970), suggested that the movement had been orchestrated purely by high-ranking elements of the army in order to "frame" the PKI and provide a pretext for the army's subsequent campaign to destroy the party. In this context, Wertheim pointed out that Soeharto—through his close friendship with both Untung and Latief—knew about the coup before it took place and was possibly a mastermind who had pushed the two officers into attempting the coup that would then be used as a pretext to destroy the PKI.

In a recent commentary on the movement, provided by Roosa (2006), it was argued that these varying accounts had elements of truth in them. The movement *was* a mutiny of senior field officers in which the PKI actively participated. But its participation was limited to a few members of the party's leadership and without the knowledge of the PKI as an organization. The army *did* use the movement as a pretext for destroying the PKI but had not actively orchestrated the pretext. The army merely took advantage of a fatal tactical error committed by a small number of PKI leaders. Roosa argued that the army had clearly anticipated such an error by the PKI leadership and had planned in advance a strategy to take full advantage of it.

time was US national security. Interfering in Indonesian politics would have been justified only if it helped to further those interests. The only concern to the US was that Indonesia maintained economic and political stability. As long as Indonesia's macroeconomic indicators were healthy, how stability was maintained politically was of no real interest to US policymakers. This was the dominant theoretical principle that guided US foreign policy during the Cold War. Accordingly, there was no theoretical basis within the then-prevailing schools of thought for supporting a reform movement in Indonesia that called for the establishment of the rule of law and an independent judiciary necessary to support it.

Moreover, advances in modernization theory—the development paradigm then prevailing—also supported US government policy of closely cooperating with the Indonesian military. For example, Pye (1962) argued that the army in a developing country could prove to be instrumental in bringing about modernization because of its “rational outlook” and appreciation for “technological advancement”. Similarly, Walt Rostow, a modernization theorist and advisor to the Kennedy and Johnson administrations, argued that the military in developing countries should be encouraged to assume the task of governing and that civilian control of the state could wait until a later stage in the development process (Roosa 2006: 185, citing a 1963 US State Department report). Thus, an alliance between the United States and right-wing authoritarian governments in developing countries was completely consistent with contemporary mainstream theories of economic and political development.

5. *Modernization Theory and the Law-and-Development Movement*

Nor was there any well-developed theory, in the 1960s, to support the notion that law and legal process were necessary to the development process. To be sure, there was a law-and-development “movement” during that period, but it never gained any real theoretical coherence (Trubek 2006). The movement gained momentum principally through a series of development projects in a number of countries in Latin America and Africa. Schooled in teachings of modernization theory, the pioneers of the movement sought to ‘modernize’ the legal systems of developing countries away from formalism towards an instrumentalist problem-solving approach, which many took for granted prevailed in the legal systems of the developed countries of the West. The approach the movement adopted to achieve modernization in the legal systems of developing countries was the transformation of those countries’ legal culture. As a

practical matter, this meant modernizing legal education, with Western legal academics going over to teach in developing countries' universities, while law students from those countries gained scholarships to study in Western universities. But programs and projects were devised on an "ad hoc and pragmatic" basis. There were "no well-developed theories" to explain why certain programs were favored over others (*ibid.* at 78).

It was not until the early 1970s—much too late to matter to Indonesians calling for an independent judiciary—that some theory-building was attempted. David Trubek (1972a; 1972b), one of the movement's leading proponents, sought to construct a theory based upon the sociological studies of Max Weber, which emphasized the crucial role that clear rules and legal certainty played in the development of Western capitalism. But Trubek (2001) himself later admitted that this Weberian theoretical framework "did not sit easily together" with the instrumentalist approach of modernization theory. Moreover, as this early effort at theory-building began to gain traction, the "failures of the initial reform projects were beginning to become apparent" (Trubek 2006: 79). This incongruence between theory and practice was to sow the seeds of disillusionment among the scholars engaged in the movement. By 1974, a mortal "crisis" had beset the movement (Trubek & Galanter 1974). Legal scholars engaged in development research "encountered difficulties defining the nature of their work or explaining its social utility" (*ibid.* at 1063). As it became apparent that the "movement" had failed to morph into a legitimate academic "field of inquiry", scholars began to abandon their research in law and development (*ibid.*); and the movement had effectively died by the mid-1970s.²¹

Thus, as Indonesian reformers agitated for a one-roof system away from the system of dual court administration, the development agenda of IFIs and bilateral aid agencies were silent on the issue of legal, never mind judicial, reform (Merillat 1966: 77). The few reform projects, which had to do mainly with legal education, that were carried out in the 1960s were funded almost exclusively by charitable organizations, such as the Ford Foundation. Although USAID did fund a small number of projects, the multilaterals, such as the World Bank, refrained from funding any projects to re-

²¹ Many of the theoretically-inclined personalities of the movement veered towards critical legal studies (e.g., David Trubek) that was beginning to gain momentum among U.S. legal academics, especially at Harvard, or towards an exploration of the relationships between law and society (e.g., Marc Galanter). A number of the less theoretically-inclined scholars remained active in the few reform projects still going on during the 1970s.

form legal institutions in developing countries (Trubek 2006: 78). Thus, there was no external pressure exerted upon Soeharto's regime to conform to a development paradigm with respect to legal or judicial reforms simply because such a paradigm did not exist at that time. The Indonesian reformers were quite alone in their efforts to bring about the one-roof system.

B. Reformasi, *B.J. Habibie*, and the *New Development Paradigm*

By the time a new generation of Indonesian reformers were to make the same demand in 1998, the Cold War had been over for almost a decade. The Soviet Union had imploded. Its satellites in Eastern Europe were well along their path towards liberal democracy and market capitalism. East Germany had been reunified with West Germany to form a single country well entrenched in the Western camp. And China had abandoned central economic planning in favor of its own form of capitalism. Only North Korea and Cuba remained as communist strongholds, but they were considered economically too decrepit to have expansionist ambitions. For all practical purposes, therefore, the threat of communist aggression in the third world was over.

Thus, the geopolitical realities that greeted Indonesia's third president, Bacharuddin Jusuf Habibie, in 1998 were vastly different from those that confronted his mentor, Soeharto, 32 years earlier.²² Like his mentor, Habibie also inherited an economy in shambles and badly needed US and Western help to get it back on track. Once again, the United States rode to the rescue but, this time, with a different kind of urgency. On October 27, 1997, the New York Stock Exchange suspended trading after the Dow Jones Industrial Average fell 554 points or over 7 percent. Stock exchanges in Hong Kong, Tokyo, and in Europe followed suit with other stock exchanges also dropping the following day in Brazil and Argentina (Bresnan 1999: 89). These stock exchange crashes throughout the world were perceived as part of a contagion that began in Southeast Asia. As a response to the contagion, the US Treasury announced that it would be supporting the IMF-led bail-out by committing US\$3 billion (*ibid.*). The action was more symbolic than real, however; it was there if needed. But most of the money for the bail-out was to come from the IMF.

Like three decades previously, the help from the IMF also had strings attached. This time the strings were different, however. These strings were designed to under-

²² As Soeharto's vice president, B.J. Habibie took over the office of the presidency when Soeharto resigned on May 21, 1998.

mine, rather than support, the regime's patrimonial power base and went to the heart of the cronyism and nepotism so necessary to the maintenance of political power. The IMF bail-out was conditioned on the Indonesian government eliminating various cartels—including those for plywood and cement²³—and monopolies—including the clove-trading monopoly controlled by Tommy Soeharto, the president's youngest son. Also demanded was the effective scuttling of IPTN,²⁴ the aircraft manufacturer owned by the state and controlled by Habibie (Robison & Rosser 2000). The IMF also imposed legal reforms as conditionalities, specifically the passage of new bankruptcy laws as well as the establishment of the Commercial Court, a court to be especially created to hear bankruptcy cases.²⁵ The Commercial Court was considered vital to economic recovery since it was to be lynchpin of the corporate restructuring effort that needed to be undertaken (O'Rourke 2002: 151). These conditionalities were very different from the bargain that Soeharto struck three decades previously. Unlike the help Soeharto got in the latter half of the 1960s, the package offered in 1998 had strings attached that intruded deeply into the political power relations of the country. How can we account for this big difference?

1. *Paradigm Shift*

The Cold War was over and, much more importantly, the development paradigm had shifted considerably within the IFIs and bilaterals, such as the USAID, over the previous three decades. The rule of law was in, right-wing authoritarianism frowned upon, and legal and judicial reforms had come to be regarded as essential to the development process. The paradigm shift had begun in the early 1980s when the US government began to reorient its Cold War strategy towards fostering democracy as a way of countering communist insurgencies in developing countries. To this end, it had also begun to spend money helping a number of Latin American countries improve their judicial systems in an effort to shore up the stability of the area's fledgling democracies (GAO 1993). The intellectual impetus for this new direction in US foreign policy came from the findings of the Kissinger Commission, published in 1984, that recommended "the United States support democratic processes and institutions, in

²³ The plywood cartel was controlled by Bob Hassan, a close Soeharto crony while Liem Sioe Liong, another crony, had considerable investments in cement production.

²⁴ *Industri Pesawat Terbang Nusantara*.

²⁵ This was reflected in the Letter of Intent from the Indonesian government to the IMF, dated April 10, 1998. See p. **Error! Reference source not found.**70, *supra*, for further details of the reform program.

part, by improving the administration of justice” (ibid. at 1). By 1989, money had also been earmarked for legal and judicial reform projects in Central and Eastern European countries emerging from Soviet domination (ibid. at 2).

Writing shortly before the downfall of the New Order, Carothers (1998) remarked that the *rule of law* had become the “new nostrum” in foreign policy debates when they concern the issue of ‘transition economies’ and developing countries. About a year later, Diamond (1999) argued that the establishment of an independent judiciary was necessary to democratic consolidation in such countries. This line of thought has emerged as a result of the recognition that governments in countries generally considered to be ‘democratic’ tend to function best when the executive is accountable not only *vertically* to the electorate but also *horizontally* to other branches of government. O’Donnell (1999) pointed out that in many emerging democracies such as South Korea and the Czech Republic or even in more established ones like India and Colombia, where free and fair elections are regularly held, the government often still functions less than optimally because the *liberal* and *republican* components of these countries’ accountability mechanism—that insure the government’s so-called horizontal accountability—are still weak. By *republican*, O’Donnell meant the belief that those who rule should not be exempt from, but should instead be subject to, the same laws as all other citizens. And, by *liberal*, he meant citizens enjoy certain inalienable rights that cannot be legislated away. Of course, in making this argument, O’Donnell was simply saying that the ideal government should be limited in its powers vis-à-vis its citizens and be subject to the rule of law; otherwise a democracy may amount to nothing more than the tyranny of the majority.

The line of argument made in O’Donnell (1999) is followed by Franck (2001: 169) who maintained that even in a democracy, government action will be legitimate and therefore respected by its citizens only if it is consistent with the country’s “constitution or rules of order, or is pedigreed by [its] tradition and historic custom.” Franck (ibid.) went on to argue that only an independent judiciary can “determine whether a proposed exercise of [governmental] power is procedurally legitimate and accords substantively with fundamental rules of fairness [previously] agreed [to] by the democratic process.” This line of argument to limit the powers of government and to subject it to the rule of law is explicitly applied in empirical studies of judicial reforms (Frühling 1998; Domingo 1999). It is the logic of this relatively recent democratization theory that has propelled judicial reform to the center of many development assis-

tance agenda. As Trubek (2006) noted, it was as a result of the “project of democracy” that the “rule of law” has come to replace and supersede “law and development” as an important component of development assistance. This development paradigm had become well established by the time that *Reformasi* brought down the Soeharto regime in 1998. Moreover—and, in all likelihood, even more importantly—legal and judicial reforms had also gained sufficient theoretical traction within the IFIs to become a standard feature of their *economic* development agenda. The theoretical importance of such reforms to economic development was to form the central pillar of what Trubek (2006) called the “project of markets” within the IFIs.

Here the tale begins with one of the central conundrums of neo-classical economic theory—the convergence thesis. In a 1956 paper, Robert Solow introduced a thesis that has now become known as the ‘Solow neoclassical growth model.’²⁶ The accepted implication of the model for development theory was that a poor country’s economy would grow at a faster rate than that of a rich country, assuming that they both had the same investment rate and as long as the poor country’s population growth did not outpace that of the rich country (Cypher & Dietz 1997: 125-27). Taken to its logical conclusion, the Solow growth model therefore predicted that the economy of a poor country would eventually converge with that of a rich country in terms of per capita income, as the poor country’s economy inevitably caught up.²⁷

But the predicted convergence failed to materialize. For a time, many neoclassical theorists blamed too much government intervention in the economy for this failure;²⁸ and argued that the remedy was ‘to take the state out’ of the economy.²⁹ As it

²⁶ Solow (1956).

²⁷ The provisos are strict, however; for a poor country to develop, it needs to save a percentage of its income for capital investment and adopt measures to slow down its population growth. Unfortunately, this is easier said than done. It was widely accepted at that time by economists interested in the development of third-world countries that accomplishing these two tasks needed the active participation of the state in a poor country’s development process, hence the widely-accepted state-centered approach of development policies of the time.

²⁸ State intervention, these theorists maintained, led to price distortions by preventing market forces from setting prices. The result is a misallocation of resources and economic inefficiency—resources are being used to make things for which there is little or no demand in the market. Instead of adding value, the production process was diminishing the value of scarce resources.

²⁹ The policy prescription for third-world development that followed, which eventually came to be known as the Washington Consensus, naturally became the deregulation and privatization of developing economies. Many of these policy prescriptions were forced upon developing countries through “structural adjustment loans” (SALs), where in return for balance of payments assistance or budget support, countries were obliged, among other things, to privatize state-owned enterprises, to abolish regulations that were thought to restrict the free market, such as tariffs, quotas, and restrictions on certain banking activities, and to open their economies to direct investment by foreign corporations.

turned out, the policies of deregulation and privatization—often referred to as the Washington Consensus—proved no more effective in bringing about a convergence of the world’s economies just as the theory behind them proved no more capable of explaining the persistence of that divergence. In the early to mid 1990s, however, a new paradigm began to emerge within the development community at the World Bank and elsewhere based upon a theory of institutions.

In 1990, Douglass North published his book, *Institutions, Institutional Change and Economic Performance*, in which he argued that the divergence in performance between the economies of the industrialized West and those of the developing countries could be explained by the difference in their respective institutional structures.³⁰ By institutions, North meant ‘the rules of the game’—a country’s custom, culture, habits and, most important of all, its formal laws. Where a country’s institutions and its enforcement mechanisms (viz. its court system) favored the protection of property rights, its economy can be seen to perform remarkably better than in countries where this was not the case. North argued that institutions that protect property rights lowered transaction costs³¹ and therefore encouraged arm’s-length trade.³²

³⁰ North (1990). Douglass North went on to receive the Nobel Prize in 1993 for his contribution to economics.

³¹ Transaction costs are those incurred in the course of contract enforcement and would include lawyers’ fees, insurance premiums, etc. Wallis & North (1986) pointed out that fully 45 percent of the US GDP consisted of transaction costs. Sometimes when transaction fees become prohibitive, arm’s-length trade simply ceases to take place (see fn 23).

³² In trade, North argued, uncertainty abounds. Can one’s trading partner be relied upon to fulfill her end of the bargain? What remedies are available in case of a default? Uncertainty is one reason why in many economies trade only takes place between kinfolk or within a small community where the traders know each other well. Such a trading environment is not conducive to large-scale economic growth. Uncertainty makes trade between strangers difficult. North points out that knowledge is often asymmetrical between two strangers; for example, a used car dealer will almost certainly know more about the car he is selling than would a prospective buyer. In such a situation, there is a great temptation for the individual possessing the better knowledge to lie and cheat. There is a need therefore for parties to an exchange to obtain and verify information about each other and about the goods or services to be exchanged. Of course, the information that is needed is not cost-free. The amount that parties to the exchange need to pay to obtain information is referred to as their transaction costs. To the extent that they are too high or even prohibitive, trade will not take place.

Notwithstanding the costs to transacting, North went on to argue, it is all too often impossible to obtain all the information necessary to make either side totally comfortable. Moreover, many transactions—such as employment contracts—are only concluded over a period of time. In such transactions, it is necessary for one or both parties to enforce the contract continuously over the life of the agreement. North argues that because of these limitations, complex transactions between strangers are practically impossible in the absence of institutions, such as courts, to enforce the contracts. Courts and the laws they apply are what North calls third-party enforcement. The more effective third-party enforcement is within a given country, the more complex transactions can become within that country. Complex transactions among strangers are the foundations upon which to base large-scale economic growth (North 1990, 1995).

Here, at last, was an explanation that would seem to solve the conundrum that has bedeviled development specialists in academia and the aid agencies and that, at the same time, validated the fundamental principles of neoclassical economic theory. Indeed, as North (1995: 17) himself has put it, “in contrast to the many earlier attempts to overturn or replace neoclassical theory, [the theory of institutions] builds on, modifies and extends neo-classical theory to permit it to come to grips and deal with an entire range of issues heretofore beyond its ken”. The free market can and should be considered as an engine of economic growth in developing countries. This point was important because it was consistent with the prevalent free-market philosophies that had begun to take hold in the West at the end of the 1970s with the political ascendancy of Ronald Reagan and Margaret Thatcher. Small wonder, then, that this ‘new institutional economics’ (NIE) was quickly seized upon as the new development paradigm. Ironically, though, this ‘post-Washington Consensus’ required ‘bringing the state back in’ since enacting market-friendly laws and establishing a strong judiciary that can be relied upon to provide good third-party enforcement all require the active participation of a third-world country’s government in its development agenda.

The role that NIE played in bringing legal and judicial reforms to the *economic* development agenda proved to be crucial in establishing these reforms as pro forma aspects of standard development policies within the IFIs. The World Bank, the pre-eminent development organization among the IFIs, is prohibited by its charter from intervening in the political process of a member country. Thus, judicial reform as part of the “project of democracy” would not have been acceptable as an item on the World Bank’s development agenda. It would be debatable, therefore, whether judicial reforms would have been quite so universally accepted had they not been also regarded as a necessary part of a third-world country’s economic development. It was as a result of this widespread acceptance that the IMF was able to pressure the Indonesian government into accepting the need for establishing a new and specialized commercial court to deal with the numerous bankruptcies brought on by the Asian financial crisis.³³ But this still begs the question why Habibie and fellow elites were unable to resist these reforms?

³³ See p. 70, *supra*, for further details of the reform program.

2. *B.J. Habibie: 'President By Accident'*

Habibie was unable to resist implementing at least some of the reforms because he was politically weak. Given his political weakness, Habibie was perhaps not so far off the mark when he referred to himself, as he often did, as “PBA” (O’Rourke 2002: 139). He was an improbable choice. He had, as Emmerson remarked (1999: 314), “what analysts of American politics would call ‘high negatives’.”³⁴ He was disliked by Soeharto’s technocrats because he was a profligate spender of public money on high-technology industrialization that routinely turned out to be highly wasteful economically.³⁵ As Soeharto’s minister of technology & research, Habibie managed a huge portfolio of ‘strategic’ industries that included, aircraft manufacturing, shipbuilding, steel production, and munitions and weapons production (Balowski 1998). His profligacy obviously did not endear him to IFIs and other foreign investors. Market confidence in ‘Habibienomics’, never very high to begin with, sank to new lows when he was nominated as Soeharto’s vice president in February 1998, possibly causing an already weakened rupiah to plunge from 8,000 to 17,000 to the US dollar (Emmerson 1999: 314).

Habibie’s activities as minister of technology also got him into trouble with the army. He stoked the military’s ire when his portfolio started encompassing the arms procurement process. Prior to this, the military had enjoyed a steady stream of revenues through the practice of overpricing arms procurement. Habibie’s entry into this process interrupted that practice and reduced the money that would have gone to the generals. At the same time, the new practice also saddled the military with high-tech gadgets that it did not really need nor want (O’Rourke 2002: 141). The strained relationship between Habibie and the military was to take a nasty and very public turn in 1994 when he bought 39 used warships from the former East German Navy without first consulting the military. Although the ships cost the government only US\$12.7 million to buy, the necessary repairs to ensure the ships’ seaworthiness and to adapt them to tropical maritime conditions (e.g., replacing the ships’ heating systems with air-conditioning equipment) required an additional expenditure of US\$1.1 billion. The

³⁴ With such “high negatives”, one might ask, why Soeharto chose Habibie as his vice president in 1998?

³⁵ Upon returning to Indonesia, Habibie was able to convince Soeharto that Indonesia needed to embark upon a path towards high-technology industrialization, with the goal of gaining manufacturing capability of sophisticated machinery such as aircraft, ships, etc. These industries, Habibie argued, were ‘strategic’ to enabling Indonesia “to ‘leapfrog’ from a less developed country to a modern global economy” (O’Rourke 2002: 140).

total amount of money required would have caused a serious dent in the armed forces' budget (Kingsbury 2003: 159; Aditjondro 1998b). Although in this particular instance the army and the technocrats prevailed, and Habibie had to give way, his close personal connection to Soeharto typically protected him against both the army and the technocrats.³⁶

Habibie's close relationship with Soeharto was also to put him in the center of the divide between modernist and traditionalist Muslims. In 1990, Soeharto sponsored the establishment of ICMI,³⁷ the Indonesian Association of Muslim Intellectuals, and appointed Habibie as its chairman. ICMI was supposed to bring Muslims—a group Soeharto had hitherto excluded from political activity—to his side in his struggle against the military's top brass in their demand for a greater say in how the state was run. Although the establishment of ICMI was met with approval by most Muslim leaders in Indonesia, it was decried by Abdurrahman Wahid, the influential leader of country's largest Islamic organization, the Nahdlatul Ulama, as an undemocratic and politically dangerous development. ICMI, Wahid argued, could breed religious intolerance and promote the establishment of an Islamic state in Indonesia. Habibie's close identification with ICMI had thus put him at the center of this civilian religious-secularist divide in Indonesian politics. His involvement with ICMI also brought him once again into conflict with the army, the majority of whose leaders were secularist in their political orientation (Eklöf 1999: 18-19).

Habibie's close personal connection to Soeharto helped Habibie to build a sizeable business empire of his own. One accounting estimated that the Habibie family owned about 40 companies involved in numerous business activities ranging from telecommunications and chemicals to pig and poultry farming (Balowski 1998). The Habibie family would have personally benefitted from the refitting of the 39 German warships since the huge job of installing air-conditioning units had been contracted to a company owned by Habibie's brother-in-law (Aditjondro 1998b). The family may

³⁶ The two had first met in 1950 when Soeharto, then a young army officer, was stationed in Habibie's hometown in South Sulawesi where he helped put down separatist rebellions against the newly-independent Indonesian republic. A neighbor to the Habibie family during his stay in South Sulawesi, Soeharto quickly befriended Habibie's mother, a Javanese woman from Soeharto's hometown, and more or less adopted her as his own. After Habibie's father died in 1950, when Habibie was 14 years old, Soeharto promised to help the young Habibie continue his education. It was probably with Soeharto's help that Habibie eventually got the opportunity to pursue further studies in engineering in West Germany, getting his doctorate in aeronautical engineering there in 1965. When Soeharto summoned him in 1974, Habibie gave up a lucrative and very promising career at Messerschmitt, the German aircraft manufacturer, to go back to Indonesia and serve his patron (O'Rourke 2002: 139-40).

³⁷ *Ikatan Cendekiawan Muslimin se-Indonesia*.

have also profited from this transaction in other ways. For example, although she denied any involvement in the purchase of the 39 warships, sources in both Indonesia and Germany alleged that it was Habibie's youngest sister who had brokered the deal (ibid.). This type of self-dealing was ultimately to brand Habibie as a Soeharto crony.

Given these many negatives, Habibie's presidency was considered illegitimate by many factions almost from the start. Shortly after he assumed office, therefore, these factions were publicly calling for Habibie to hold elections to choose new members of the DPR. For example, Amien Rais, leader of Muhammadiyah, a large organization comprised of modernist Muslims, demanded that general elections be held within six months, with a presidential election by the MPR to follow soon after (O'Rourke 2002: 144). These demands for elections reflected a general dissatisfaction among the public with Habibie since elections were not mandated by the 1945 Constitution until 2003, when Soeharto was due to step down from his sixth term in office. As vice president who took over from a sitting president, Habibie could therefore constitutionally continue to hold office until that time.

But without new elections, Habibie realized, his government would not have the legitimacy it needed to rule. He therefore agreed to them in principle but remained vague about setting an actual date. He was to face continuous pressure to establish a firm election date from all sides, including the US State Department (ibid. at 145). It was not until June 22nd that Habibie announced an election schedule. First, the MPR was given until December to pass new laws that would govern the elections. Once having done that, the MPR would then immediately hold an extraordinary session to decide an actual election date. Habibie argued for holding the elections no sooner than June of the following year with the new MPR convening to pick the new president by the end of that year. So, a new president would not take office for another 18 months at the earliest (ibid. at 147). Due to criticisms, however, the extraordinary session of the MPR was moved forward to mid-November. It was subsequently rescheduled for the 10th-13th of that month.

The extraordinary session of the MPR would prove significant for Habibie's presidency. Constitutionally, the MPR was authorized to dismiss Habibie and find someone else to step into the presidency (ibid. at 160). Recall that at that time, the MPR met only every five years to elect the president and vice president and to issue the Broad Outlines of State Policy. Since it had already met in March of 1998, the MPR was not due to meet again until 2003. Thus, many saw the extraordinary session

as a golden opportunity to oust Habibie from the presidency. Foremost among them was the army. For the reasons discussed above, many high-ranking army officers took great exception to Habibie assuming the presidency. In its quest, the army was joined by political progressives within Golkar who disliked Habibie's profligacy as minister of technology and his close association with ICMI. In 1998, the MPR was still dominated by Golkar, the political party Soeharto created, as well as by representatives of the army. In many ways, therefore, control over the MPR rested in the hands of whoever controlled Golkar (ibid. at 154-60).

The army chose General Edi Sudrajat, a retired officer who had served as one of Soeharto's ministers of defense, as its candidate for party chairmanship. If he were to win, Sudrajat would then nominate General Try Sutrisno, Soeharto's vice president before Habibie, for president. Under this scenario, Habibie's presidency would come to an early end. It was only due to Sutrisno's political ineptitude that the army's campaign to take over the presidency failed. He had 'shot himself in the foot' by unwittingly identifying himself as a Soeharto stooge (ibid. at 157-58). This forced General Wiranto, who was then serving as minister of defense and commander-in-chief of the armed forces, to side with Habibie, throwing the armed forces' considerable network in the provinces behind Habibie's choice for party chairman, Akbar Tandjung (ibid.).

Meanwhile, factions outside the state also had their daggers drawn against Habibie's presidency. The most vocal among them were the student groups that had organized the demonstrations that ultimately brought down the New Order. Forkot,³⁸ a cross-campus group of student activists, was among the first to reject Habibie's presidency (Robison & Hadiz 2004:181). They were joined by Famred,³⁹ a group that had a more non-violent approach and had splintered from Forkot, and by Komrad,⁴⁰ which had close ties to the PRD,⁴¹ a radical political group that had been suppressed by the New Order (Aspinall 1999: 226-27). Even the moderate FKSMJ,⁴² a group comprised of cross-Jakarta-campus student senates, joined in the condemnation of Habibie's presidency (ibid.; Robison & Hadiz 2004: 181). Starting in early September 1998, these

³⁸ *Forum Kota* or City Forum.

³⁹ *Front Aksi Mahasiswa untuk Reformasi dan Demokrasi* (University Students' Action Front for Reformasi and Democracy).

⁴⁰ *Komite Mahasiswa dan Rakyat Untuk Demokrasi* (University Student and People's Committee for Democracy).

⁴¹ *Partai Rakyat Demokratik* (People's Democratic Party).

⁴² *Forum Komunikasi Senat Mahasiswa Jakarta* (Jakarta University Students Senates Communication Forum).

student groups once again began to demonstrate and to occupy regional parliament buildings across Indonesia and the broadcasting stations of RRI,⁴³ the state broadcasting service (Aspinall 1999: 226).

The students saw the extraordinary session of the MPR scheduled for November 10-13 as a mere rubberstamp event to approve Habibie's presidency and as a means for the elites to push through a program of moderate reforms at a gradual pace instead of the *Reformasi Total* that they wanted to introduce. They therefore agitated to stop the extraordinary session from taking place and called instead for the immediate removal of Habibie from office and for replacing him with a presidium comprised of leading *Reformasi* figures pending new elections. In this, the students were joined by the *Barisan Nasional* (National Front), a group comprised of many eminent veterans of the revolutionary struggle against Dutch colonialism. Among them was a retired marine lieutenant-general, Ali Sadikin, who had been a very popular governor of Jakarta (O'Rourke 2002: 160-63). Sadikin was a progressive who had backed the creation of LBH, the Legal Aid Institute founded by Buyung Nasution, and provided funding for the organization (Aspinall 2005: 101). After falling out of favor with the New Order, Sadikin had also become a vocal critic of the regime.⁴⁴ Joined by another veteran of the revolution, Lt.-Gen. Kemal Idris, Sadikin and the other members of the National Front constituted a formidable group with a great deal of prestige and authority. The National Front joined the students in calling for Habibie's immediate removal from office and for the creation of a presidium pending new elections. They "provided [the students] with guidance and press attention—as well as access to financing for food, transport, banner production and all the accoutrements needed by a large-scale protest movement" (O'Rourke 2002: 162).

The alliance between the students and the National Front was formidable and "caused serious consternation in Habibie's camp" (ibid.). Most feared was an alliance between the students and the National Front, on one side, and one or more of three politicians with popular support—Megawati Soekarnoputri, Amien Rais, and Abdurrahman Wahid—on the other. With one or more of these politicians joining the students

⁴³ *Radio Republik Indonesia*.

⁴⁴ In 1980, Sadikin had signed the so-called 'Petition of Fifty', a 'statement of concern' submitted to the MPR and signed by 50 distinguished citizens, including General Abdul Haris Nasution and four other prominent generals as well as two former prime ministers. The Petition expressed concern that Soeharto had been using Pancasila, the state ideology created by Soekarno, as a weapon against his political enemies (Bresnan 1993: 194-217).

and the National Front, the combination was likely to be strong enough to force the MPR into removing Habibie from office even with Golkar under his control (ibid. at 162-63). The students did manage to force Megawati, Rais, and Wahid to respond to their demands. The response was to prove disappointing, however. On November 10, 1998, the three—joined by Sultan Hamengkubuwono of Yogyakarta—issued a statement, popularly known as the Ciganjur Declaration, that rejected the need for a presidium. Moreover, the Declaration only called for an end to military participation in politics after a six-year period.

These political developments on the domestic front were important in explaining why Habibie, a Soeharto protégé, would agree to implement *satu atap*. With demands for reform so vocal and his political position so weak, Habibie had no choice but to accept certain reforms. In order to stay in office, Habibie had to demonstrate some democratic credentials. At the very least, Habibie had to be seen as a reformer. The circumstances forced Habibie's hands: "Coming into office as he did," as Bouchier (2000: 31) explained, "unexpectedly and at a time of great upheaval, [Habibie] had no choice but to ride the wave of *Reformasi*." It is uncertain, however, to what extent *satu atap*, as it was introduced by Habibie's government, actually brought Indonesia nearer to having a clean, competent and independent judiciary. As Adi Andoyo Soetjipto (2000: 276) pointed out, Law No. 35/1999 made no mention about actual reform efforts to curb the corruption that has plagued the judiciary. The bill was hurriedly passed, with the DPR taking a mere 14 days to deliberate the bill. Moreover, it is unclear how much political support the bill had with only 210 out of 500 DPR members attending the session on July 30, 1999, the day that the bill was passed (ibid.).

II. The Long and Tortuous Path to Judicial Independence

Has judicial independence been established in Indonesia? The more open attitude of the Supreme Court, ushered in by Chief Justice Bagir Manan, and its willingness to work cooperatively with LeIP in producing the much-acclaimed 'blueprint' for the reform of the Court, have been considered significant milestones on the road to reform.⁴⁵ There is even a permanent reform beachhead in the Supreme Court consisting

⁴⁵ For example, Sebastiaan Pompe and Zacky Husein, two people from the donor community involved in the judicial reform process, praised the Supreme Court Blueprint as being "without precedent". They did warn, however, that the reforms proposed in the Blueprint needed to be implemented if Indonesia

of nine reform professionals, joined by eleven Supreme Court justices as well as administrators and led by Deputy Chief Justice Paulus Lotulung, who together form the ‘Supreme Court Judicial Reform Team.’⁴⁶ The goal of this group is to bring about some basic changes in the working routine and operations of the Supreme Court, which will hopefully bring about changes in the culture of the Supreme Court and the judicial system as a whole over the long term.⁴⁷ This receptive attitude towards reform on the part of the Supreme Court is cause for much optimism within the reform community in Indonesia and abroad among bilaterals and multilaterals.⁴⁸

Ultimately, however, the proof of the pudding is in the eating. Can and do Indonesian judges now render competent legal judgment free from political interference and illicit monetary inducements? Seen from this perspective, the picture is much gloomier and more pessimistic. Although there are judges who perform their jobs professionally and independently, the judiciary as a whole seems to remain dysfunctional. Sadly, this is particularly the case with the Supreme Court some of whose recent decisions have been highly questionable.

A. Continuing Political Subservience

A number of relatively recent high-profile cases show that the judiciary, especially the Supreme Court, remains politically subservient. The first of these involved the corruption prosecution of Akbar Tanjung, then chairman of Golkar and the speaker of the DPR. It was alleged that prior to the 1999 general election, Tanjung—then also State Secretary⁴⁹ in B.J. Habibie’s cabinet—had improperly used Rp. 40 billion (about

wanted to see actual progress (‘Supreme Court Blueprint: An Innovative Reform Plan’, *Jakarta Post*, November 11, 2003).

⁴⁶ The ‘Supreme Court Judicial Reform Team’ is funded mainly by the Partnership for Governance Reform which, in turn, is funded by the UNDP. In addition, the Team also receives funding from other foreign donors, including USAID, the EC, AusAID, the World Bank and the Dutch government. The Team was chaired by Chief Justice Bagir Manan while its day-to-day administration is the responsibility of Deputy Chief Justice Paulus Lotulung (Interview with Wiwiek Awiati, April 25, May 26, 2005, and May 3, 2007, in Jakarta; Ms. Awiati was consultant to the Judicial Reform Team in the Supreme Court of Indonesia).

⁴⁷ Awiati Interview

⁴⁸ Sebastiaan Pompe and Zacky Husein were very optimistic about the progress of reform because, under Bagir Manan, the Supreme Court appeared to be receptive to reforms (‘Supreme Court Reform Program Pleases Donors’, *Jakarta Post*, January 16, 2004).

⁴⁹ The State Secretary (*Sekretaris Negara* or *SekNeg*) occupies a powerful cabinet position responsible for assisting the president in his guise as the head of state. When the position was filled by Soedharmono during the New Order, the State Secretary was also responsible for government procurement. It was therefore not only a powerful position (by virtue of Soedharmono’s close association with Soeharto) but also a very lucrative one.

US\$4.5 million) of state funds belonging to Bulog,⁵⁰ the national agency responsible for determining the logistics of food distribution, to supplement Golkar's campaign war chest (Clear 2005: 170). The funds had been especially earmarked for the purchase of food to be distributed to the poor whose circumstances had become even more straitened as a result of the Asian financial crisis (Lane 2004). After a trial at a Jakarta district court, Tanjung was convicted in September 2002 and sentenced to three years in prison. In January 2003, the Jakarta High Court upheld both his conviction and sentence. Tanjung then appealed to the Supreme Court. A little over a year later, on February 12, 2004, a 5-member panel of the Supreme Court reversed the High Court's decision, finding that Tanjung's conviction had been based on "weak evidence" (Lane 2004).

Interestingly, the Court did not reverse the conviction of the two men convicted along with Tanjung, although it reduced their sentences from three years to 18 months (McBeth 2004a). The two men, Dadang Sukandar and Winfried Simatupang, had been employed by Tanjung to manage the money (ibid.). This discrepancy and the scathing dissent written by Justice Abdul Rahman Saleh, along with the undisputed facts of the case, led many commentators to claim foul play.⁵¹ Andi Asrun, a member of Indonesia's Judicial Watch, an NGO, claimed that "'high-level' political pressure or collusion was behind Tandjung's acquittal".⁵² Todung Mulya Lubis, a prominent lawyer and reformer, speculated that by reversing Tanjung's conviction, the Supreme Court was helping "the country's *elit politik* [political elite]" because his "conviction would have resulted in many other corrupt politicians being dragged before the courts" (Lane 2004). Benyamin Mangkoedilaga, an administrative judge made famous by his courageous decision in the *Tempo* case during the New Order, noted that the Supreme Court's decision in the Tanjung case indicated the continuing prevalence of political interference in the country's judicial system.⁵³

Other cases decided by the Supreme Court as well as by lower courts that show a lack of independence have involved the prosecution of high-ranking military officers and their civilian associates for human rights violations, especially with regards to the

⁵⁰ *Badan Urusan Logistik*.

⁵¹ Interestingly, the majority's decision was read out in the Court by Justice Paulus Lotulung, the man now in day-to-day charge of the reform process at the Supreme Court ('Court Verdict Shocks Indonesians', *UPI*, February 13, 2004, available at http://www.infid.be/corruption_akbar.htm).

⁵² Ibid.

⁵³ 'Akbar's Acquittal Spurs Call for Control of Court', *Jakarta Post*, February 16, 2004.

mass killings that took place in East Timor in 1999. For example, on March 13, 2008, the Supreme Court reversed its own decision of two years previously affirming the conviction of Eurico Guterres, the infamous militia leader allegedly responsible for many of the killings that took place in East Timor in 1999. Specifically, Guterres had been convicted by the Indonesian Ad Hoc Human Rights Court—on November 27, 2002, and sentenced to 10 years imprisonment—for failing to stop members of his *Ai-tarak* (“Thorn”) militia attacking the house of Manuel Carrascalão, a prominent pro-independence East Timorese politician (McDonald et al. 2002). Indeed, eyewitness accounts, as well as a secret report of the Indonesian military, indicate that Guterres had actually egged on members of his militia to kill Carrascalão (Robinson 2003: 201). On the day of the incident, April 17, 1999, many victims of the escalating violence elsewhere in East Timor had sought refuge in Carrascalão’s home in Dili, the capital city. According to Amnesty International, many of the refugees sheltering in Carrascalão’s home had been eyewitnesses to human rights violations that took place in the areas they had come from (ibid. at 202). This may have been the reason why Carrascalão’s home had been specifically targeted. Official accounts placed the number of people killed in the raid at 12, including Carrascalão’s teenage son.⁵⁴ Unofficially, eyewitness accounts counted the number of those killed to have been as many as 60 (ibid. at 202-03).

Guterres appealed his conviction but the appellate court affirmed his conviction in 2004. In doing so, however, the court reduced Guterres’s sentence to five years imprisonment, thereby ignoring the statutory minimum sentence of ten years. Guterres then appealed to the Supreme Court, which upheld his conviction and reinstated his 10-year sentence in March 2006. In response, Guterres invoked a process called *Peninjauan Kembali*, by which the Supreme Court would review a case where the petitioner can show that new evidence would exonerate him or that the Supreme Court’s prior decision contained a “clearly visible flaw”.⁵⁵ The Supreme Court agreed to review the case and concluded (1) that the killings that took place in Carrascalão’s house resulted from a conflict in which both sides were armed; that, in fact, the militia members were spontaneously rescuing pro-integration supporters who were being held against their

⁵⁴ Carrascalão himself, along with his daughter, managed to escape the raid alive and later testified at the Ad Hoc Human Rights Court.

⁵⁵ The discussion here relies on an analysis of the Supreme Court’s decision, ‘Overview of the Indonesian Supreme Court’s Decision in the Eurico Guterres Case’, published by the International Center for Transnational Justice, and is available at: http://www.ictj.org/static/Asia/Indonesia/ICTJ_IDN_GuterresCase_cm2008.pdf.

will in Carrascalão's house; (2) that, as a civilian, Guterres did not have sufficient authority to stop the militia members from acting; and (3) that, because Abilio Soares, Indonesia's governor in East Timor and Guterres's official superior, had been acquitted of these same charges, it would be unfair to uphold Guterres's conviction and sentence. Although the Court asserted that it had granted the review because of a "clearly visible flaw" in its previous decision and those of the lower courts, that flaw was never discussed or even identified. Nor did the Court provide any evidence to back up its assertion that the killings in Carrascalão's house were the results of a conflict in which both sides were mutually armed. In fact, this version of events, one popularly accepted by Indonesia's military establishment, has been flatly contradicted by outside observers who were witnesses to the events, including by rapporteurs of the UN Commission on Human Rights.

This recent decision by the Supreme Court prompted Usman Hamid, the Coordinator of KontraS, the human rights NGO once led by murdered activist Munir Said Thalib, to say that the Indonesian "legal system is incapable of providing justice to victims of gross human rights violations".⁵⁶ The Supreme Court is not alone in its inability to bring to justice members of the military and their civilian associates. The Ad Hoc Human Rights Court itself has a poor record of convicting gross human rights violators. For example, it acquitted Col. Tono Suratman in May 2003 of charges involving the April 17, 1999 attack on Manuel Carrascalão's house. As the military commander of East Timor, Col. Suratman was responsible for law and order within his jurisdiction. But Suratman refused to intervene to stop the violence even after Carrascalão had gone to his house to ask for protection against an attack that seemed imminent. Apparently, the then-Irish foreign minister had been in Suratman's house when Carrascalão came to ask for help and had witnessed Suratman's refusal (Robinson 2003: 204-05). Moreover, the Ad Hoc judge who presided over Guterres's trial had noted that "Tono [Suratman] ignored a report from Manuel that his house would be attacked by pro-Jakarta militiamen" (ibid. at 205). Yet, the Ad Hoc Court acquitted Suratman, concluding that it was the responsibility of the police, not Suratman's, to maintain law and order in East Timor.⁵⁷

⁵⁶ 'Kasus Timor Timur—Tinjau Ulang Pelanggaran HAM Berat', *Kompas*, April 7, 2008. The article was translated into English by James Balowski. It is available at http://asia-pacificsolidarity.net/southeastasia/indonesia/indoleft/2008/kompas_legalsystemincapableofjustice070408.htm.

⁵⁷ 'Rights Court Acquit Former East Timor Military Commander', *Jakarta Post*, May 23, 2003.

Political interference or collusion was also suspected in the *Soeharto v. Time Magazine* case, decided by the Indonesian Supreme Court on August 28, 2007. The case centered on the publication on May 24, 1999 by *Time* of a 13-page special report entitled ‘Suharto Inc.’, which alleged that Soeharto and members of his family had accumulated assets through various shady dealings worth US\$15 billion during his 32 years in power.⁵⁸ In November 1999, Soeharto filed a lawsuit at the Central Jakarta District Court alleging defamation. After a 7-month trial, the District Court rendered a verdict against Soeharto in June 2000. Goenawan Mohammad, founder and editor of *Tempo* magazine, and Sabam Siagian, a journalist, lawyer and one of Indonesia’s former ambassadors to Australia, testified on *Time*’s behalf that the special report had observed generally acceptable journalistic practice.⁵⁹ Soeharto appealed to the Jakarta High Court but was once again disappointed when it affirmed the lower court’s findings in March 2001 (ibid.). Soeharto then appealed the High Court’s findings to the Supreme Court in April 2001 where it remained in limbo for over six years. Finally, on August 28, 2007, the Supreme Court issued its decision, reversing the High Court’s judgment.

In reversing the High Court, the Supreme Court used the country’s penal code instead of the 1999 press law,⁶⁰ which the two lower courts had applied. The press law, passed by B.J. Habibie, was designed to encourage a free press and emphasized fairness in reporting. Just about 18 months prior to the *Soeharto v. Time* case, the Indonesian Supreme Court had applied the press law to overturn a lower court decision in the *Tomy Winata v. Tempo* case, where the Central Jakarta District Court had applied the penal code to convict and sentence Bambang Harymurti, *Tempo*’s editor-in-chief, to a year in prison for defaming Tomy Winata, an ethnic-Chinese Indonesian businessman closely connected to the New Order regime. *Tempo* had published an article in March 2003, which suggested that the businessman might have been responsible for the fire that engulfed a Jakarta textile market since he stood to gain from it financially.⁶¹ The Supreme Court’s decision reversing the lower court’s findings was hailed as a triumph for press freedom in Indonesia. Mr. Harymurti even compared the Indonesian Supreme Court’s decision to the 1964 decision of the U.S. Supreme Court

⁵⁸ *Time* (Asia Edition), vol. 153(20).

⁵⁹ ‘Long Live Suharto Inc.’ *Tempo Magazine*, September 18-24, 2007.

⁶⁰ Law No. 40/1999.

⁶¹ ‘Ada Tomy di Tenabang?’ [Was Tomy in Tenabang?], *Tempo*, March 3, 2003.

in *New York Times v. Sullivan*,⁶² a key decision supporting the freedom of the press in the United States. Indeed, in September 2004, Chief Justice Bagir Manan had urged judges to use the press law in deciding cases involving the press. Thus, the Court's decision in *Soeharto v. Time Magazine* was a shock to those who supposed that the practice of the New Order era of suppressing the press was a thing of the past.

Several things are noteworthy about the Supreme Court's decision; not least of which was the composition of the panel that decided the case. Chief Justice Bagir Manan picked Maj.-Gen. German Hoediarso to chair the panel. Hoediarso had been a military lawyer all his life. Military lawyers, as discussed in chapter 2, had played a large part in elaborating the legal philosophy and ideology of the New Order. Moreover, it was reported that Hoediarso "had once said that he owed his career to Suharto".⁶³ By itself, this unfortunate choice of Hoediarso as chair of the panel may not have raised too many eyebrows. But the panel went on to emphasize that *Time* "had sullied the plaintiff's good name and honor as a great retired general of the Indonesian armed forces and former president of the Republic of Indonesia."⁶⁴

This very act of sullyng the former president's good name and honor was sufficient, in the Court's judgment, to constitute an illegal act because *Time* had failed to prove two things alleged in the article. On pages 16-17 of the article, *Time* had printed a caricature of Soeharto hugging a house later identified as an actual house located in London, England. It turned out, however, that although the house may have belonged at one stage to Sigit Harjojudanto, one of Soeharto's sons, it no longer belonged to the Soeharto family at the time that the article was published.⁶⁵ The article had also alleged but was never able to prove that Soeharto had transferred about US\$9 billion from a Swiss to an Austrian bank shortly after he stepped down from office in May 1998 (McBeth 2007). These two inaccuracies were enough, in the Court's opinion, to show that *Time* had published a defamatory article without due regard to fairness, care, and prudence. The panel ignored the fact that two other publications had already re-

⁶² 376 U.S. 254 (1964).

⁶³ 'Time Magazine appeals \$100 million Suharto libel ruling', *International Herald Tribune*, February 21, 2008.

⁶⁴ "[M]encemarkan nama baik dan kehormatan pengugat sebagai Jenderal besar TNI purnawirawan dan mantan presiden RI", Antara News, September 10, 2007, available at <http://www.antara.co.id/arc/2007/9/10/mamenangkan-soeharto-lawan-majalah-time-asia/>.

⁶⁵ 'Long Live Suharto Inc.!', *Tempo Magazine*, No. 03/VIII, September 18-24, 2007.

ported the alleged US\$9 billion in 1998, ahead of the *Time* special report.⁶⁶ Thus, the Supreme Court had imposed an onerous burden upon the press to show that all allegations it makes must be totally accurate. Effectively, any inaccuracy would be sufficient to show that due care and due regard for fairness and prudence had not been exercised.

Also controversial about the Supreme Court's decision were the damages awarded in the case. *Time* and the seven individuals involved in writing the special report had to pay Soeharto the sum of Rp. 1 trillion (about US\$109 million) and publish an apology in five Indonesian-language dailies, five Indonesian-language magazines, as well as the Asian, European and American editions of *Time* for three consecutive editions.⁶⁷ The severity of the punishment meted out to *Time* has led commentators to speculate that the Supreme Court was doing more than just simply meting out punishment. Some have argued that the Supreme Court was helping to take the heat off the Soeharto family. For example, shortly after the publication of the *Time* article, both the attorney general and the minister of justice stepped up their corruption investigation of the various members of the Soeharto family.⁶⁸ The *Time* article had also been used as corroborating evidence in a legal proceeding between Tommy Suharto and BNP Paribas in Guernsey, United Kingdom.⁶⁹ The Indonesian attorney general had intervened in the proceeding to claim that the 36 million euros at stake in the litigation were the proceeds of corruption and should therefore not be released to Tommy Suharto.⁷⁰ The Supreme Court's decision makes it that little bit harder for the authorities to use the article as corroborating evidence in the future.⁷¹ Other commentators believe that the decision might have been intended to have a chilling effect on press freedom, especially where it concerns corruption.⁷² The Supreme Court's decision probably proved to be too embarrassing to the government and the Supreme Court itself. In

⁶⁶ *Wirtschaftsblatt*, a German publication, had reported the transfer in its July 31, 1998 edition, and *Baron's*, a financial weekly published in the U.S., had reported it in its July 27, 1998 issue (McBeth 2007).

⁶⁷ *Antara News*, September 10, 2007, available at <http://www.antara.co.id/arc/2007/9/10/ma-menangkan-soe-harto-lawan-majalah-time-asia/>

⁶⁸ 'Long Live Suharto Inc.!', *Tempo Magazine*, No. 03/VIII, September 18-24, 2007.

⁶⁹ 'Cutting the Clippings', *Tempo Magazine*, No. 03/VIII, September 18-24, 2007.

⁷⁰ *Antara News*, September 10, 2007, available at <http://www.antara.co.id/arc/2007/9/10/ma-menangkan-soe-harto-lawan-majalah-time-asia/>. To what extent the article influenced the Guernsey court into accepting the Indonesian government's argument is unclear ('Cutting the Clippings', *Tempo Magazine*, September 18, 2007).

⁷¹ *Antara News*, September 10, 2007, available at <http://www.antara.co.id/arc/2007/9/10/ma-menangkan-soeharto-lawan-majalah-time-asia/>.

⁷² See 'Killing Time', *Tempo Magazine*, September 18, 2007; "'Time' Verdict a Blow to Freedom', *Jakarta Post*, September 15, 2007.

February 2008, the Court decided to accept a petition for review (*Peninjauan Kembali*) filed by Time and in April the following year handed down a decision reversing itself in the case. In doing so, the Supreme Court decided to apply the Press Law to the case.⁷³ It should be noted that the Supreme Court accepted the review petition approximately a month after Soeharto's death in 2008. One can only speculate how the Court would have decided to treat the petition if Soeharto had not died.

These cases show that political considerations continue to play an important part in judicial decisions. While there are courageous judges who have made independent decisions in politically-sensitive cases, such as the trial and appellate judges in the *Soeharto v. Time Magazine* case, the judiciary as a whole appears to remain politically pliant. The Supreme Court, in particular, seems to be especially sensitive to political pressure.

B. Continuing Judicial Corruption

Mahfud MD, the current chief judge of Indonesia's Constitutional Court was quoted in September 2007, as saying that judicial corruption and the so-called 'judicial mafia' were still very much alive.⁷⁴ By this measure, Mahfud went on to remark, "we must say the Supreme Court under Bagir Manan has failed to reform." He pointed to the Harini Wiyoso corruption prosecution as proof that the mafia still existed.⁷⁵ Wiyoso, who was a retired appellate judge-turned-advocate, was representing businessman Probosutedjo, Soeharto's half-brother, before the Supreme Court on his cassation appeal from a corruption conviction⁷⁶ in June 2004. The facts show fairly clearly that Wiyoso arranged for Probosutedjo to give Pono Waluyo, a Supreme Court travel section employee, Rp 800 million plus US \$400,000 in cash. What is unclear was Waluyo's allegation that he was acting on behalf of Chief Justice Bagir Manan, who happened to be chairing the panel that was to hear Probosutedjo's cassation petition. The Chief Justice admitted to having met with Wiyoso on one occasion but vehement-

⁷³ 'Suharto Libel Award Overturned,' *Financial Times* (UK), April 16, 2009.

⁷⁴ In September 2007, Mahfud MD was still a member (PKB) of the DPR's Commission III on Law, Legislation and Human Rights. He was appointed to the Constitutional Court by President Yudhoyono on April 1, 2008 and subsequently elected as chief judge on August 6, 2008 by his fellow judges. He served as Minister of Defense in President Wahid's cabinet and was professor of law at Universitas Islam Indonesia in Yogyakarta.

⁷⁵ 'Court Mafia Still Plagues Indonesian Supreme Court: Expert', *Jakarta Post*, September 7, 2007.

⁷⁶ Probosutedjo had been convicted by the Central Jakarta District Court in 2003 of embezzling reforestation funds worth about Rp. 100 billion and sentenced to four years imprisonment. The Jakarta High Court affirmed the conviction but reduced his sentence to two years.

ly denied having any part in the attempted bribery.⁷⁷ Wiyoso, on the other hand, claimed that she had spoken to the Bagir Manan about the case.⁷⁸

Acting on a tip-off, the KPK had raided the offices of the Supreme Court and found a large amount of money in the clerks' office. The KPK arrested Wiyoso and Waluyo along with four other administrative employees of the Supreme Court allegedly involved in the corruption scandal. Meanwhile, there were calls⁷⁹ for Bagir Manan to step down, at least temporarily. But the chief justice refused. Although there was no evidence to suggest that Bagir Manan had taken part in the bribery scandal, such scandals were common in the past. As recently as 2000, a *Tempo* article⁸⁰ had alleged that then-Chief Justice Sarwata had accepted bribes, often brokered by his son Wawan Sarwata. Indeed, the business of brokering cases at the Supreme Court was allegedly common practice. Brokers are commonly found among the Court's clerks but anyone closely connected to the clerks, including janitors and security guards, will often act as a broker.⁸¹ In this way, judgments are typically bought and sold. Frans Winarta (2002), a member of the National Law Commission, observed that payment can be made in several ways to help disguise the transaction. One example he cited was of a judge who was paid Rp. 300 million (about US\$30,000) to speak at a seminar.

This scandal was to resurface at the trial of Wiyoso and Waluyo before the Anti-Corruption Court in 2006. The KPK prosecutor moved that Bagir Manan be called as a witness. Under Indonesian law, the panel was compelled to call the chief justice, especially after the three ad hoc judges sitting on the panel agreed with the prosecutor. However, the chair of the panel, a career judge, refused to call Manan. After it became obvious that no compromise between the career and ad hoc judges could be reached, the three ad hoc judges walked out in protest.⁸² The three ad hoc judges were subsequently replaced and the court proceeded to find Wiyoso guilty.⁸³ Bagir Manan was never called to testify and the KPK never pursued a case against him. Former judge Benjamin Mangkoedilaga speculated that the two career judges refused to call Manan

⁷⁷ 'Supreme Graft', *Tempo Magazine*, October 11, 2005.

⁷⁸ 'Indonesia's CJ Embroiled in Graft Scandal', *Straits Times*, October 15, 2005.

⁷⁹ E.g., from former Justice Minister Muladi, 'Bribery Rampant in Court: Commission', *Jakarta Post*, October 18, 2005.

⁸⁰ 'Dari Lapangan Parkir Sampai Meja Yang Mulia' [From the Parking Lot to the Holy Table], *Tempo OnLine*, April 17, 2000, available online at

<http://majalah.tempointeraktif.com/id/arsip/2000/04/17/INT/mbm.20000417.INT112824.id.html>.

⁸¹ 'The Flawed Final Recourse', *Tempo Magazine*, October 11, 2005.

⁸² 'Judges Clash over Bid to Force Chief Justice's Testimony', *Jakarta Post*, May 4, 2006.

⁸³ 'Lawyer Gets 4 Years for Attempted bribery', *Jakarta Post*, July 1, 2006.

to testify because they were concerned about their own career prospects.⁸⁴ It was certainly a reasonable speculation to make, but equally likely was the possibility that the career judges involved were simply protecting their own.

Proving a corruption charge against a judge in Indonesia is extremely difficult. Amien Sunaryadi, former vice chairman of the KPK noted that in the past 30 years only two judges have been convicted of corruption.⁸⁵ Most recently, Herman Allositandi, a South Jakarta District Court judge, was convicted of extorting a witness. Before that, the last judge arrested for bribery was in 1977, also from the same district court.⁸⁶ Yet, it is well accepted that judicial corruption is widespread in Indonesia. The case of Endin Wahyudin illustrates well why bringing the judges to justice is often so difficult.

Endin Wahyudin was involved in a dispute over a piece of real estate and lost the case at trial. He subsequently appealed his case to the Supreme Court where, in 1998, he allegedly paid off the panel of judges hearing his cassation petition in exchange for a favorable judgment. He got a favorable judgment from the Supreme Court but had problems getting the district court to execute the Supreme Court's judgment. Frustrated at receiving no help from the Supreme Court judges he had bribed, Wahyudin decided to blow the whistle on them by taking his complaint to the TGPTPK,⁸⁷ the Joint Team for the Eradication of Crimes of Corruption.

The TGPTPK was a temporary task force created, pursuant to Government Regulation No. 19/2000, in anticipation of the establishment of the KPK, the Corruption Eradication Commission, mandated by Article 43(1) of Law No. 31/1999, which had superseded Law No. 3/1971.⁸⁸ The TGPTPK was therefore a stop-gap measure the Indonesian government created to satisfy IMF demand for governance reform (Chalid 2001).⁸⁹ In its Letter of Intent to the IMF, dated May 17, 2000, the Indonesian government stated that the TGPTPK was to operate under the auspices of the Attorney General's office and was to focus its efforts on "complex corruption cases and the

⁸⁴ 'Stalled and Divided', *Tempo Magazine*, May 16, 2006.

⁸⁵ 'Crooked Judges Key Obstacle to Corruption Fight: Indonesian Panel', *Business Times Singapore*, June 15, 2007.

⁸⁶ 'Taking the Fight to the Courts', *Straits Times*, January 14, 2006.

⁸⁷ *Tim Gabungan Pemberantasan Tindak Pidana Korupsi*.

⁸⁸ Law No. 31/1999 provided the substantive standards of what constitutes corruption. It was enacted post-*Reformasi* to replace Law No. 3/1971, which was enacted during the New Order.

⁸⁹ The discussion of the *Endin Wahyudin* case draws heavily on Chalid (2001). Hamid Chalid was a member of the TGPTPK.

court system”.⁹⁰ Even before TGPTPK could proceed with the case in court, IKAHI, the Indonesian Judges’ Association, filed a *pra peradilan* (a pre-trial hearing) with the district court. The motion was accepted although a *pra peradilan* motion was restricted to cases of detention and seizure (Assegaf 2002: 138-40). The court decided that the TGPTPK was not authorized to investigate alleged corrupt acts that took place prior to the enactment of Law No. 31/1999. IKAHI then brought petition for judicial review before the Supreme Court seeking to nullify Government Regulation No. 19/2000, the instrument that provided for the establishment of the TGPTPK. The Supreme Court accepted the petition and promptly declared Government Regulation No. 19/2000 invalid because it expanded the power of the TGPTPK beyond what was warranted by Law No. 31/1999. The expanded powers of the TGPTPK conflicted with the Criminal procedure Code (*ibid.*).

There are several disturbing things about the Supreme Court’s action. First, according to article 31(3) of Law No. 14/1985, which governed the powers of the Supreme Court, judicial review of the validity of laws and regulations needed to be made as a cassation petition rather than directly to the Supreme Court. IKAHI had to go through a trial court before it could petition the Supreme Court to determine the validity of Government Regulation No. 19/2000 (Chalid 2001).⁹¹ Second, Justice Paulus Lotulung was the chair of the panel that heard the judicial review petition; but Lotulung’s earlier appointment by IKAHI to act as counsel for the three Supreme Court judges charged with corruption clearly presented a conflict of interest (*ibid.*; Assegaf 2002: 139). Third, the Supreme Court had only recently come to the opposite conclusion when reviewing the validity of Government Regulation No. 17/1999 concerning IBRA. In that case, the Court concluded that the regulation was valid despite the fact that it was inconsistent with Indonesia’s banking law (*ibid.*).

Because the TGPTPK had been declared invalid, the Attorney General’s office took over the case and prosecuted the three judges. The two district courts that heard the case held that since the bribery allegedly took place in 1998, the judges could not be charged under Law No. 31/1999. On the other hand, since Law No. 3/1971 has

⁹⁰ See ¶ 37 of the Letter of Intent, available at www.imf.org/external/np/loi/2000/idn/02/memo. External technical legal assistance was provided by the government of The Netherlands.

⁹¹ The Supreme Court had issued a regulation—No. 1/1999—that permitted petitions for judicial review to be made directly to the Supreme Court. But because the regulation conflicted with Law No. 14/1985, arguably it was invalid. The Court argued, however, that since Law No. 14/1985 had been slated for revision, the regulation took precedence over enacted legislation (Chalid 2001).

been superseded by the 1999 law, the judges could not be charged under the 1971 law either. This Catch-22 scenario, taken to its logical conclusion, essentially means that any corrupt act committed during the New Order cannot be prosecuted (Chalid 2001). Meanwhile, the three judges brought suit for defamation against Endin Wahyudin and won. The court sentenced Wahyudin to six months in jail but suspended the sentence. If the judiciary had been sending a message to would-be whistle-blowers, it could not have been clearer. Sadly, this was not an isolated incident. The same thing happened to Maria Leonita, an attorney who had bribed Zainal Agus, a high-ranking administrator of the Supreme Court. When her client lost the case despite the bribe, Leonita decided to blow the whistle. But although Agus was acquitted in his corruption trial, Leonita went on to face defamation charges (Chalid 2001).

The short history of the TGPTPK showed that the judiciary was willing to go to considerable length to stymie efforts to curb judicial corruption and to close ranks to protect judges and other judiciary personnel. Unfortunately, the introduction of the one-roof system seems to have reinforced the tendency towards judicial corruption by making the judiciary less accountable for its actions. Judging by the decisions of courts in politically-sensitive cases, the one-roof system has also been less than successful in enhancing the independence of the judiciary in Indonesia.

III. Did *Reformasi* Alter Indonesia's Informal Institutional Matrix?

It is argued here that the demand for the one-roof system should be construed broadly within the historical context of Indonesia's political system as a popular demand for the introduction and implementation of a new *formal* institution—the *rule of law* and all its related formal political institutions—to replace the hitherto prevailing *informal* institution—the *rule of discretion* and all its related informal political institutions including, above all, the country's long-established patrimonialist-style politics. What would such a change entail?

During the New Order, the country's informal institutional arrangement 'competed' (Helmke & Levitsky 2004) against the state's ineffective formal institutional arrangement. They 'competed' because the two arrangements are incompatible: adhering to one institutional arrangement necessarily meant violating the other. During Soeharto's New Order, the rule of law existed on paper but the informal institutions upon which the regime depended for its political survival—corruption, nepotism, and clientelism—demanded the routine violation of the very precepts of the rule of law.

Thus the introduction and implementation of the rule of law in Indonesia would entail, at minimum, the concerted and purposeful subversion of these three informal institutional pillars of the New Order. To what extent has this been accomplished?

A. *The Wahid Presidency*

KKN—corruption, collusion and nepotism—continued practically unabated during Abdurrahman Wahid’s short presidency. It barely lasted 21 months, and during a great deal of that time, Wahid devoted his time and energy into staying in power. Recall that Wahid was not elected president directly by the electorate but by the MPR.⁹² After the 1999 general elections, Wahid’s party, the PKB, managed to secure only 51 seats, or about 10 percent of the seats in the DPR. Both Megawati Soekarnoputri’s newly-formed PDI-P and Soeharto’s old political vehicle, Golkar, had much better luck during the elections with 154 seats (almost 31 percent) going to the former and 120 seats (24 percent) going to the latter. Megawati, therefore, had a stronger claim to the presidency on the basis of her party’s strong performance in the general elections. But her gender and her ineptitude at political horse-trading were to lay to rest—for the time being at least—her presidential ambitions. Her gender proved to be a stumbling block for the Islamist parties but it was probably not insurmountable had it not been for Megawati’s reluctance to bargain and form a coalition at least with two of the most significant of these parties: Wahid’s PKB and Amien Rais’s PAN.

It was a tribute to her political ineptitude that she managed to bring these two bitter rivals together in a loose alliance. Wahid’s Nahdlatul Ulama represented a traditionalist but syncretic approach to Islam, in which Hindu and Buddhist traditions dominant in pre-Islamic Java as well as Javanese mysticism are incorporated. By contrast, Rais’s Muhammadiyah, which constituted the bulk of PAN’s support, represented a modernist approach that is shorn of indigenous beliefs and religious traditions carried over from an earlier pre-Islamic Javanese empire. Some adherents of Muhammadiyah are also ardent supporters of the Islamicisation of politics, seeking to introduce closer relations between Mosque and state (O’Rourke 2002: 15-17).

Concerned about having only a marginal political role under a Megawati administration, Rais formed what he called the Central Axis (*Poros Tengah*), consisting

⁹² The MPR consisted of 700 members, 462 of whom were to be elected members of the DPR. The military had 38 representatives in the DPR, all of whom were appointed. In addition, there were also 135 appointed regional representatives and 65 appointed representatives of functional groups, such as civil servants, farmers, etc.

of small Islamic parties, which together commanded 119 seats (almost 24 percent) in the DPR.⁹³ To bring the PKB to his side, Rais offered Wahid the presidency in exchange for the chairmanship of the MPR for himself. When B.J. Habibie decided not to run once his accountability speech had been rejected by the MPR on October 19th, many of his supporters in Golkar, especially those tied to ICMI, decided to back Wahid's candidacy. The following day, the MPR voted 373 to 313 for Wahid.⁹⁴ In order to heal the rift that had emerged between him and Megawati, his one-time protégé, Wahid offered her the vice presidency, which she accepted after some initial reluctance.

Although installed as president, Wahid's support consisted of political rivals who could, at any moment, pull the rug from under him. In many ways, these rivals-turned-supporters hampered Wahid's ability to formulate coherent policies, especially with regards to combating corruption and reforming the judiciary. Many of these rivals-turned-supporters had also gained positions in Wahid's cabinet, including Yusril Ihza Mahendra, leader of the Islamist PBB, who was appointed as Wahid's Minister of Justice. His appointment, as O'Rourke (ibid. at 328) noted, "elicited bitter disappointment from all those who sought rapid progress in reforming the cornerstone of the Soeharto system: the legal system and particularly the judiciary." Indeed, very little was accomplished in advancing the judicial reform agenda under Mahendra's stewardship. For example, as minister of justice, it was within his power to fire corrupt judges and promote honest ones. But he failed to do so (ibid. at 355-56). Although Law No. 35/1999 had been enacted to establish the one-roof system, it existed only in theory. Subsequent legislation was needed actually to bring the system to reality. As a result of legislative inaction, very little could be done to prosecute high-profile corruption cases such as the Texmaco and Bank Bali scandals; and hampering successful prosecutions against politically well-connected conglomerates was perhaps the intended consequence of such inaction.

Within the Supreme Court, meanwhile, Sarwata was still enthroned as chief justice. He was a three-star air force general "who had served as the cornerstone of Soeharto's judiciary for many years" (O'Rourke 2002: 363). He was also the first

⁹³ The *Poros Tengah* consisted of PPP (59 seats), PAN (35 seats), PBB (13 seats), PK (6 seats), PNU (3 seats) and three other Islamic parties with a seat each.

⁹⁴ In addition to the *Poros Tengah* and elements of Golkar, Wahid owed his presidency to the military, the regional representatives and the representatives of functional groups.

chief justice to have been publicly accused of corruption (Pompe 2005: 167). As such, Sarwata was probably the last person one could expect to lead any thoroughgoing reform of the judiciary. Together, Sarwata and Mahendra permitted the practice of buying and selling verdicts to persist. In the Commercial Court, for example, IBRA, the Indonesian agency responsible for restructuring the country's ailing banks, had great difficulty getting favorable verdicts against indebted companies (O'Rourke 2002: 365-66). Mahendra opposed the idea of introducing ad hoc judges, recruited from outside the career judiciary and therefore thought to be less susceptible to bribery, to the Commercial Court (ibid.). Mahendra also helped to obstruct Wahid's desire to install Benjamin Mangkoedilaga, who had a sterling reputation for independence and honesty, as chief justice of the Supreme Court when he backed instead two candidates proposed by Golkar and nominated by the DPR: former Justice Minister Muladi and Bagir Manan, an academic who had worked from 1990 to 1998 as a high-level functionary in the Justice Ministry (ibid.). When Wahid refused to choose either candidate nominated by the DPR, Mahendra went so far as to champion a revision to the Supreme Court Law that would compel the president to choose one of the candidates nominated by parliament.⁹⁵

An independent judiciary that is not susceptible to bribery is needed if corrupt practices were to be eradicated. The problem was that corruption was rife within the DPR, an institution whose cooperation was needed to bring about an effectively functioning judiciary. For example, it is not uncommon practice for interested parties to bribe parliamentarians in order to get a bill passed that would favor their interests. During Habibie's presidency, it was alleged that Bank Indonesia, the country's central bank, bribed DPR members to insure the passage of a bill on the central bank (Irwan 2002: 80). Although the Governor of Bank Indonesia and members of the DPR's committee responsible for drafting the bill denied the allegations, similar allegations were made with respect to amendments to the law governing the central bank in 2003. These allegations have recently led to the prosecution and conviction of Bank Indonesia executives as well as several members of the DPR.⁹⁶

DPR members can also be bribed into favoring the selection of certain candidates to fill public offices. In 2000, it was alleged that members of the DPR were bribed to choose Aulia Pohan as deputy governor of Bank Indonesia. These allega-

⁹⁵ 'Yusril: Law on Supreme Court should be revised', *Jakarta Post*, February 1, 2001.

⁹⁶ 'Oey, Rusli sentenced to four years imprisonment', *Jakarta Post*, November 12, 2008.

tions were confirmed by one member of the DPR (Irwan 2002: 83). Similar allegations surfaced with respect to the appointment of Miranda Swaray Goeltom as senior deputy governor of Bank Indonesia in 2004.⁹⁷ Agus Condro Prayitno, a PDI-P member of the DPR has admitted to receiving bribes and has alleged that 41 other DPR members probably received similar bribes to vote in favor of Ms. Goeltom's appointment (ibid.). Money politics also permeates the way individuals are elected to the DPR. Irwan (2002: 91-98) argued that the 1999 general elections were fraught with bribery and electoral fraud. For example, *Kompas*,⁹⁸ an Indonesian daily, reported that Golkar had distributed about Rp. 206 million in Gowa, South Sulawesi, in addition to giving Rp. 100,000 to each village chief within the jurisdiction to persuade them to vote for Golkar (ibid. 92-93). Civil servants were also induced to vote for certain parties through bribery. It is uncertain where the money for these purposes came from, but off-budget slush funds as well as funds from interested third parties are considered to be likely sources (ibid. 94-95). With so much money politics going on in the DPR, it is unlikely that many members would push for the introduction of reform efforts to improve the independence and professional integrity of the judiciary.

The lack of progress in reforming the judiciary during the Wahid administration can also be blamed on the president himself. Wahid was not corrupt in the sense that he did not make a fortune while holding public office, but he did have a "traditional sense of patron-client relations", which got him into trouble (Kingsbury 2005: 303). He used the powers of his office to try to stop the investigation into possible corruption involving the abuse of BLBI⁹⁹—Bank Indonesia Liquidity Support—funds by his friends Marimutu Sinivasan, owner of Texmaco, and Sjamsul Nursalim, another powerful owner of the Gajah Tunggal conglomerate (Irwan 2002: 85-86). BLBI funds were distributed to distressed banks in the aftermath of the Asian financial crisis to prevent them from defaulting on their depositors. But the liquidity support provided by the country's central bank were typically abused by their recipients. Many of the banks receiving the support belonged to conglomerates such as Gajah Tunggal. But instead of being used to pay the banks' depositors, the funds were used to pay off the conglomerates' debts and to pay for investments overseas. As security for BLBI, the conglomerates pledged their corporate assets, whose value was often vastly inflated.

⁹⁷ 'A Tale of Vote-Buying', *Tempo Magazine*, September 23, 2008.

⁹⁸ February 26, 1999.

⁹⁹ *Bantuan Likuiditas Bank Indonesia*.

In the end, the Indonesian government was left holding the bag, with many conglomerates escaping (sometimes literally, as in the case of Sjamsul Nursalim) their financial obligations.

More serious for Wahid's own political survival than these attempts to subvert the due process of law for his close associates were two corruption scandals that directly involved the president. In the so-called Bulogate scandal, the president's personal masseur managed to swindle Sapuan, the deputy director of Bulog, the state's logistical agency responsible for food distribution, out of about US\$3.5 million. Believing that the masseur was acting on the president's behalf and reacting to the promise of promotion, Sapuan raided Bulog's employees' retirement fund and handed the money over to the masseur. In another scandal, often referred to as Bruneigate, Wahid was accused for failing to account for a private donation of about US\$2 million from the Sultan of Brunei, which was ostensibly intended as humanitarian aid for Aceh. These two corruption scandals were to provide good fodder in the struggle to topple Wahid's presidency.

Despite his "traditional sense of patron-client relations", Wahid wanted to pursue reformist policies. To this end, he strained continuously against the cabinet that was more or less imposed upon him as a result of the Faustian bargain he struck with the MPR on his road to the presidency. In an effort to reform the military, Wahid fired General Wiranto, his coordinating minister for state security and reached into the administration of the armed forces by insisting on the appointment of General Agus Wirahadikusumah, well known for his reformist credentials, as commander of Kostrad (Kingsbury 2005: 294). These moves made Wahid unpopular within the armed forces, which at that time still controlled 38 seats in the DPR/MPR. Then Wahid angered two more parties that were crucial to his support in the MPR: he fired Laksamana Sukardi (of the PDI-P) from his post as state minister in charge of state-owned enterprises, and Jusuf Kalla (of Golkar) from his position as minister of trade. He also sidelined Kwik Kian Gee (of the PDI-P) from his important post as co-ordinating minister of the economy. Kwik resigned a few months after Sukardi and Kalla were fired from their positions. Barely ten months into his presidency, Wahid had alienated the majority of his supporters.

These former supporters-turned-political-adversaries quickly sought ways in which they could discredit the president. Bulogate and Bruneigate were to provide them with such an opportunity. The PBB, whose leader Yusril Mahendra was finally

sacked in February 2001 from his position as minister of justice, became an enthusiastic backer of the move to impeach Wahid over his involvement in these two corruption scandals (Kingsbury 2005: 298). That same month the DPR passed a censure motion against Wahid related to these two corruption cases (ibid.). The momentum towards impeachment had clearly started since the DPR passed a second censure motion about two months later, this time over the overall ineffectiveness of his presidency (ibid. 304). It was in response to this second censure motion that the president offered Golkar an olive branch by agreeing to appoint Bagir Manan as chief justice of the Supreme Court (O'Rourke 2005: 398). But the gesture proved to be too little too late. The MPR moved to impeach Wahid on July 23, 2001. Although the excuse used to unseat the president were the two corruption scandals in which he was involved, the move to impeach him was, as Kingsbury (2005: 309) has put it, motivated "by interests that were less concerned with democracy, much less reform, and more to do with re-establishing the power of long-standing vested interests." Slater (2004) came to the same conclusion when he argued that Wahid broke the cartel agreement he struck with his supporters to share political power at the cabinet level. Slater understood the parties' participation in the cabinet as a way distributing the rent-seeking opportunities that came with public office. Wahid's impeachment and the elevation of Megawati Soekarnoputri in his place as president was the cartel's way of reassuring its continuation. Whatever efforts Abdurrahman Wahid made to implement new formal institutions leading to the introduction of the rule of law, they were thwarted by interests that benefitted from the continuation of the rule of discretion.

B. The Megawati Presidency

The presidency of Megawati Soekarnoputri represented a restoration of the party cartel, which began with the election by the MPR of Abdurrahman Wahid as president in 1999. Wahid's defection from the cartel eventually brought about his political downfall (Slater 2004: 72-78). The essence of Slater's argument is that the party cartel left no effective political opposition in the DPR/MPR since all political parties with seats in parliament were members of the cartel. The arrangement also left voters with no real political alternative. This meant that the government could do, or choose not to do, anything at all without suffering the political consequences that typically come from ignoring the voters' concerns in well-functioning democracies. Consequently, the government could safely choose to ignore popular demands for reforms. Indeed,

the purpose of the party cartel was to enable politicians to sustain rent-seeking activities that came with the control over the government's gate-keeping institutions. Thus, under this scenario, one would expect very little to be done by the government to advance the struggle against corruption or the development of judicial institutions that would be required in such a struggle.

This turned out to be largely true. There was a great deal of foot-dragging and delays in the government's effort to bring about the one-roof system of judicial administration. One could have predicted slow progress on this front by Megawati's choice of Yusril Mahendra as her minister of justice. Rifqi Assegaf (2007: 16 fn. 21) argued that Mahendra was reluctant to relinquish his department's control over judicial administration and finance because the Department of Justice could always use funds allocated for court administration for other purposes within the department. Moreover, Assegaf (*ibid.*) also suggested that Mahendra personally profited from his department's continuing control over the judiciary because of his interest in seeing to the success of the law firm he founded after he was fired by Abdurrahman Wahid in February 2001.

There is no proof that Mahendra retained any sort of proprietary interest in his law firm after he left the reins of the firm in his brother's hands when he left to take up his ministerial appointment. However, Frans Winarta, a member of the National Law Commission, pointed out that there was a potential conflict of interest nonetheless.¹⁰⁰ He argued that judges, knowing that their career prospects depended upon the goodwill of the minister of justice, would tend to favor the minister's old firm in cases where it played an active role. Amir Syamsuddin, an advocate in private practice, agreed and pointed out that the "Indonesian people do not trust the legal system to be impartial or to have integrity. Therefore, people are eager to hire influential and powerful people to make sure the judges will issue verdicts in their favor."¹⁰¹ Although there was no proof that Mahendra actually used his official position to influence judges to favor his old firm's clients, there was some indication that he had improperly intervened in at least one on-going litigation. A plaintiff in a lawsuit in which Mahendra's old firm was representing the defendant claimed that Mahendra had summoned his lawyer and asked him to drop the lawsuit. In this particular instance, Mahendra's old firm won the

¹⁰⁰ 'Influential figures should stay out of the courts', *Jakarta Post*, November 28, 2002.

¹⁰¹ *Ibid.*

case for its client.¹⁰² But a current partner of the firm claims that they have also lost a significant number of cases before the courts.¹⁰³

Mahendra may have had other reasons to delay the implementation of the one-roof system. He had been accused of corruption on a number of occasions. He had first been accused by members of the PBB; ironically, a political party that he had founded but with some of whose members Mahendra had subsequently had disagreements. Mahendra claimed that the charges were politically motivated and because no proof could be obtained, no prosecution was ever brought.¹⁰⁴ Mahendra has recently been implicated in a corruption scandal involving an online registration system used to incorporate companies at the Ministry of Justice, which was set up during his watch as minister of justice in the Wahid administration. The system was run by a private company, which took 90 percent of the fees that applicants paid to use the system. The other 10 percent was allegedly shared by high-ranking members of the department. But the proceeds were often given to spouses of these high-ranking employees rather than directly to them. The attorney general's office recently announced that Mahendra's ex-wife had received some of that money.¹⁰⁵ Although Mahendra himself has not been charged with corruption, three of his former lieutenants directly in charge of the online system have been arrested.¹⁰⁶

Mahendra may also have been motivated to drag out the reform process because of his close association with the Indonesian armed forces. O'Rourke (2002: 410) noted that Mahendra had "consistently defended" the armed forces' interest while serving as Wahid's minister of justice and that Megawati probably appointed him to the same cabinet post in her administration to please members of the armed forces which at that time still had representation in parliament. Because of alleged human rights violations committed by their high-ranking officers in suppressing separatist elements in East Timor, Aceh and West Papua, the armed forces are understandably not enthusiastic about the prospects of a politically independent and incorruptible judiciary.

¹⁰² 'How Ihza & Ihza battled the ICI case', *Jakarta Post*, November 28, 2002.

¹⁰³ 'Influential figures should stay out of the courts', *Jakarta Post*, November 28, 2002.

¹⁰⁴ 'State Official's Wealth: Outrageous Fortune?' *Tempo Magazine*, August 28, 2001.

¹⁰⁵ 'Yusril's ex-wife used state money for overseas trips, prosecutors say', *Jakarta Post*, November 18, 2008.

¹⁰⁶ 'AGO may let Yusril off the hook', *Jakarta Post*, November 20, 2008.

The records show that progress in judicial reforms was indeed slow during the Megawati administration. Little effort was made on the part of both the government and the DPR to work on the bills intended to bring about the one-roof system for almost a year from the beginning of her administration. In June 2002, Yusril Mahendra announced that the administration and finances of the courts would be transferred to the Supreme Court by mid-2003.¹⁰⁷ But this estimate proved to be wildly overoptimistic. Although work on drafting the four bills governing the judiciary¹⁰⁸ necessary to make the one-roof system effective officially began in the DPR's plenary session on September 24, 2002, it was not until mid-November 2003, over a year later, that the DPR made a serious push to work on the bill intended to supersede Law No. 14/1970. Zain Badjeber, chairman of the Special Committee (*Panitia Khusus* or *Pansus*) of the DPR responsible for drafting the bills, announced that four large parties in the DPR had informally agreed to speed up the process to revise Law No. 14/1970. Although the PDI-P and the PBB had not joined the agreement, Badjeber said he fully expected the proposal to be accepted since more than half the members of the Special Committee had already agreed to it.¹⁰⁹ At that point, however, no agreement had been reached on the bill intended to supersede Law No. 14/1985 governing the Supreme Court. Yet, a new law governing the Supreme Court was obviously critical to the realization of the one-roof system. Badjeber announced in mid-November that work on the Supreme Court bill would begin on December 5th.¹¹⁰

Having wasted a great deal of time—well over two years since the start of Megawati's presidency—the DPR then completed the two bills with unseemly haste. Both bills were endorsed by the DPR and sent to Megawati for her signature on December 18th.¹¹¹ From beginning to end, serious work on these two important bills intended to create a clean, competent, and independent judiciary took barely over a

¹⁰⁷ 'Semua Lembaga Peradilan di Bawah MA, Pertengahan 2003' ['All Judicial Institutions Under the Supreme Court by Mid-2003'], *Koran Tempo*, June 22, 2002.

¹⁰⁸ Four laws governed the judiciary under the New Order: Law No. 14/1970 (governing the powers of the judiciary), Law No. 14/1985 (governing the Supreme Court), Law No. 2/1986 (governing the courts of general jurisdiction), Law No. 5/1986 (governing the administrative courts). The DPR also tabled Law No. 5/1991 governing the powers of the Attorney General's office for revision ('DPR Usulkan Perubahan Lima UU Bidang Peradilan' [DPR Urges Revision of Five Laws Related to Judiciary], *Kompas*, September 26, 2002).

¹⁰⁹ 'Empat Fraksi Besar DPR Sepakat: Kekuasaan Kehakiman Satu Atap Sebelum Pemilu Legislatif 2004' ['Four Large DPR Factions Agree: Judicial Power Will Be Under One Roof Before 2004 Legislative Elections'], *Kompas*, November 17, 2003.

¹¹⁰ 'House to speed up law revision to build better judiciary', *Jakarta Post*, November 17, 2003.

¹¹¹ 'House lifts hurdle to judicial liberty', *Jakarta Post*, December 19, 2003.

month. The seriousness with which the work was undertaken can perhaps also be seen by the number of DPR members who actually showed up to endorse the bills. Only 207 out of 500 members bothered to show up. The low turn-out prompted Patrialis Akbar (PAN) to speculate that perhaps the bills might have been illegitimately passed since the number of members who attended the meeting failed to constitute a quorum (ibid.). But Deputy House Speaker, Soetardjo Soerjogoeritno, argued that since 309 members had signed the attendance list, only 155 members actually needed to be present to constitute a quorum (ibid.)! But for the two bills to become law, they still needed Megawati's signature, and they remained unsigned until January 15, 2004.

Two other bills needed to be passed in order to bring about the one-roof system: one intended to replace Law No. 2/1986, governing the courts of general jurisdiction, and Law No. 5/1986, governing the administrative courts. Work on these two bills was to take another two months to complete. They were finally endorsed by the DPR on March 1, 2004. But, once again, attendance by members of the DPR was low. Only 252 members had signed the attendance sheet but only 90 had actually bothered to show up.¹¹² Megawati went on to sign the two bills into law on March 29, 2004.

Although these two bills were supposed to guarantee the independence of the judiciary, article 14(2) in each bill returned judges in the courts of general jurisdiction and the administrative courts to civil servant status (*pegawai negeri*). This could be seen as a step backward for judicial independence since, as Pompe argued (2005: 128-29), their status as civil servants helped the New Order government to subjugate judges to "bureaucratic hierarchies" and imposed upon them the obligation to swear an "allegiance to the 'monoloyalty' (*monoloyalitas*) principle, which calls upon all civil servants to support the government." Habibie's Joint Working Committee, which he commissioned to explore the different ways of implementing the MPR's decree separating the judiciary from the executive, had concluded that a necessary condition for judicial independence in Indonesia was to give judges the status of a *pejabat negara*, viz. a state official (*Laporan Tim Kerja Terpadu*: 5). The DPR had, in fact, passed Law No. 43/1999 to change the status of lower court judges from *pegawai negeri* to *pejabat negara*. It was more than just a matter of semantics. The turnabout, as Assegaf (2007: 17) noted, not only "showed a lack of consistency on the part of the framers of the leg-

¹¹² 'House endorses judicial laws revisions', *Jakarta Post*, March 2, 2004.

isolation,” but also “an *unwillingness to relinquish control over the judiciary*” (emphasis added).

Habibie’s Joint Working Committee was also concerned that a one-roof system might lead to an abuse of power and greater protection for the so-called ‘judicial mafia’. It recommended that the government establish an Honor Council (*Dewan Kehormatan*), with the power (1) to supervise the conduct of judges, (2) to participate in the recruitment, promotion and transfer of judges, and (3) to draft a judicial code of conduct (*Laporan Tim Kerja Terpadu*: 54-55, 60). The MPR followed suit when it amended the 1945 Constitution for the third time, on November 9, 2001, by providing in Article 24B for the establishment of a Judicial Commission with the power to vet and recommend candidates for the Supreme Court to the DPR. It also had the power to maintain (*menjaga*) and uphold (*menegakkan*) the honor, high status, and behavior (*perilaku*) of judges. However, the amendment left the “organization, authority, and membership of the Judicial Commission” to further legislation (Article 24B(4)). The Judicial Commission had obviously been charged with the task of maintaining some sort of judicial accountability mechanism as a check against unrestrained judicial power. Given Indonesia’s history with judicial corruption, the establishment of the Judicial Commission should have been a high priority for the government’s and the DPR’s legislative agenda.

Yet, it was until almost a year later, on November 6, 2002, that the Legislative Committee (*Badan Legislasi*) sent its initiative proposals (*usul inisiatif*) on the Judicial Commission bill to the leadership of the DPR (DPR 2005: viii). It was to take over two months for the DPR to accept the initiative proposals sent by the Legislative Committee at a plenary session on January 21, 2003 (*ibid.*). Public hearings were then held and debates were conducted during the working sessions of the DPR. But it was not until June 16, 2003, that the DPR finally sent word to Megawati that it was ready to discuss the bill with the government.¹¹³ Megawati took over 10 months to respond to the DPR, finally appointing Yusril Mahendra, on April 26, 2004, as the government’s representative to the discussions.¹¹⁴ Megawati’s tardiness meant that intensive discussions on the Judicial Commission bill did not take place until almost mid-May 2004, about two-and-a-half years from the date that the MPR enacted the third amendment to the 1945 Constitution providing for the establishment of the Judicial

¹¹³ DPR Letter No. RU.02/3172/DPR RI/2003.

¹¹⁴ Government Letter No. R.06/PU/IV/2004.

Commission. The final drafting process of the Judicial Commission bill by the Working Committee (*Panitia Kerja*) of the DPR took place during the first week of June 2004. But the bill was not endorsed by the DPR until over a month later at the plenary session on July 15, 2004. That same day the DPR sent the bill to Megawati for her signature, but it remained unsigned until nearly a month later on August 13, 2004. It took the Indonesian government nearly three years to pass a law establishing a watchdog institution that was considered crucial to the proper functioning of its dysfunctional judiciary.

To be fair to Megawati and the DPR, two important political events took place in the country in 2004, which might have distracted them from their task of legislating and governing. The general elections for the DPR took place on April 5th and the first round of the country's first direct presidential elections took place on July 5th. However, it could be argued that such an important legislation should have been done well in advance of the elections. There was certainly plenty of time to get the work done in 2002 and even 2003. The fact that nothing got done during that time probably meant that to many members of the DPR and to Megawati herself, the Judicial Commission was not an important item on their agenda. Yet, such slow progress in establishing new formal institutions that would lead to the introduction of the rule of law in a country where an informal rule of discretion has for so long prevailed should not really have been a surprise. The two sets of institutional matrices competed against each other because the observance of one necessarily meant the violation of the other (Helmke & Levitsky 2004). The rule of discretion has remained strong as an informal institution that guides people's behavior. That this informal institution still reigns in Indonesia is evident by the high level of corruption and rent-seeking that continue to persist.

If under Wahid the government made some effort, albeit futile, to rein in corruption, under Megawati the status quo ante had been re-established. The rule of discretion that prevailed under the New Order and, even before it, under Guided Democracy had once again become ascendant although it now operated under a democratic framework instead of under a centralized authoritarian government. As Kingsbury (2005: 318) noted, corruption "worsened under her rule". Although it is unclear whether Megawati herself was involved in corrupt activities, it is generally accepted that her "husband was tainted by corruption" (ibid.). Moreover, during Megawati's administration the armed forces once again increased its influence on government pol-

icies. Although normally seen as an opposition figure to Soeharto, the man who ousted her father from political power, she was, in fact, a creature of the New Order. She was barely 18 when Soeharto established the New Order. To a great extent, therefore, her mindset and worldview were formed during and by the New Order. Her political behavior, as McIntyre (2005: 136) observed, “seemed to drive from a New Order way of looking at the world.” Like many members of the New Order elite, she harbored a deep distrust and fear of the masses and looked to the armed forces to act “as guardian of her relationship with the people” (ibid. 244).

Her close identification with the armed forces and the corrupt proclivities of her husband as well as of those of her fellow elites probably inclined her away from putting any faith in a new institutional matrix that would take away the prerogatives normally bestowed on a political leader under the rule of discretion. Because of alleged human rights violations committed by high-ranking officers, the armed forces were understandably not keen to institute a court system that is both independent and incorruptible. Her fellow elites whose wealth and political standing also depended upon the continuing sway of the rule of discretion. As John McBeth (2004b) observed, members of the elite had “little appetite for changes that would impose constraints on the way the rich and powerful [had] traditionally done business in Indonesia.” Quoting an unnamed former law minister, McBeth (ibid.) went on to say that legal reform would “not only restrict[] their movements, but [the elites were also] afraid they [would] become the first victims of the law.”

Laws are only as effective as their enforcement. Thus, although several pieces of important legislation relating to the establishment of a clean, competent, and independent judiciary were passed during Megawati’s watch, very little had been done actually to implement the new laws. She lost the second-round run-off elections for the presidency to Susilo Bambang Yudhoyono on September 20, 2004, barely a month after the passage of Law No. 22/2004 governing the Judicial Commission on August 13th and just a few months after she signed Presidential Decree No. 21/2004 on March 23rd, ordering the official transfer of administrative, organizational and financial responsibilities over the lower courts from the Ministry of Justice to the Supreme Court. It was perhaps the hallmark of her stewardship of the judicial reform process that she signed that decree 22 days late. Pursuant to article 42(5) of Law No. 4/2004, governing the powers of the judiciary, she should have issued the decree on March 1, 2004.

C. The SBY Presidency

Most of the task of actually implementing the one-roof system and establishing the Judicial Commission was left to Indonesia's sixth president, Susilo Bambang Yudhoyono, popularly known by his initials, SBY. The election of Indonesia's sixth president was different from all that came before; for the first time the president had been elected directly by the people, rather than by the MPR. This was a change of the political rules. Would this change in the formal rules lead to real change in the way that politics would be conducted in Indonesia? Would it lead to the dissolution of the party cartel that Slater (2004) described? If so, one could expect to see the beginning of the end of the rule of discretion and the emergence of the rule of law in Indonesia.

SBY came with some reformist credentials. Within the army, he was associated with the reformist faction that wanted to introduce greater professionalization within the military. His election under new political rules that would render him more independent from the DPR/MPR therefore seemed to be a fairly tangible sign of meaningful change. But SBY's choice of Golkar's Jusuf Kalla as his running mate during his first administration¹¹⁵ was not promising (Slater 2006a). Although the PPP, PDI-P and Golkar initially decided to form a 'Nationhood Coalition' in opposition to SBY's presidency, only the PDI-P were to remain outside of SBY's 'United Indonesia Cabinet'.¹¹⁶ Golkar and PPP broke ranks very soon after SBY's election and chose to accept positions within SBY's cabinet. Jusuf Kalla contested the chairmanship of Golkar against Akbar Tandjung and won. His victory ended Golkar's brief role as an opposition party. The smaller parties such as PKB, PAN, PBB, and the PKS, a new party that campaigned on an anti-corruption platform, were also offered and eventually accepted cabinet positions in SBY's administration. Thus, except for the conspicuous absence of the PDI-P from SBY's United Indonesia Cabinet, the party cartel seemed to have been restored. This did not bode well for fundamental change in Indonesia.

Indeed, SBY's support for judicial reform has been equivocal. His administration took nearly a year to establish the Judicial Commission (KY¹¹⁷). It was not until August 2, 2005, that he swore in the seven commissioners of the KY into office. It is

¹¹⁵ Jusuf Kalla was dropped in favor of Boediono, then-governor of the country's central bank and an internationally respected economist and technocrat, in SBY's bid for a second term in July 2009. Kalla was dropped, in part, because he chose to challenge SBY for the top job.

¹¹⁶ Much of the discussion here draws from Slater (2006a) and (2006b).

¹¹⁷ *Komisi Yudisial*.

not clear what caused the delay.¹¹⁸ But the president showed an early enthusiasm for increasing the powers of the KY. He reportedly gave his consent to the issuance of a Perpu, a regulation in lieu of a law,¹¹⁹ that would authorize the KY to investigate all 49 of the then-sitting justices of the Supreme Court in order to vet them for competence and integrity. It was to be housecleaning on a grand scale. Inevitably, the plan ran into stiff opposition from the Supreme Court and certain factions in Parliament.¹²⁰ In any case, SBY had changed his mind less than six months later and withdrew his support for the idea. Yusril Ihza Mahendra, who served as Megawati's minister of justice and who subsequently served as SBY's state secretary, explained that a Perpu is a valid instrument only for emergency situations. He said that the government saw no such urgency in that particular instance.¹²¹

Meanwhile, relations between the KY and the Supreme Court continued to deteriorate. Relations had begun to sour when the KY publicly backed the three ad hoc judges in the Anti-Corruption Court when they demanded that Bagir Manan, the Chief Justice, appear before them to give testimony in the *Harini Wiyoso* case, discussed above. The KY had also used the Chief Justice's refusal to appear as an argument for giving it the power to investigate all 49 justices of the Court. To make matters worse, the KY then leaked the names of 13 allegedly "rogue" justices who, then, reported the KY to the police for slander (LeIP 2010). Not surprisingly, 40 justices of the Supreme Court then filed a petition with the Constitutional Court to challenge the constitutionality of Law No. 22/2004, governing the KY.

The KY's powers under Law No. 22/2004 were probably insufficient to begin with. In order to investigate allegations of judicial misconduct lodged by the public, the KY had the right to summon and question the particular judge concerned. But the judge also had the right to refuse to appear, and the KY was not given the power to compel the judge's appearance. The only recourse the KY had in this situation was to make a note of the judge's refusal in the Commission's record, which may be consulted when the judge is subsequently considered for promotion. Thus, the KY's investigative powers were very limited. It had to rely upon its analysis of the judge's decision to render an opinion on the probability of judicial misconduct. This practice conse-

¹¹⁸ 'Susilo installs members of Judicial Commission,' *Jakarta Post*, August 3, 2005.

¹¹⁹ The Perpu needs to be ratified subsequently by Parliament for it to become law.

¹²⁰ 'Tug of war goes on in judiciary reform bid,' *Jakarta Post*, January 20, 2006.

¹²¹ 'Commission's request for more power shot down,' *Jakarta Post*, July 13, 2006.

quently and understandably became a sore point with the Supreme Court, which argued that it was the only authority competent to render an opinion as to the substance of a lower court's decision.

The KY's sanction powers were similarly limited. If it found sufficient evidence of judicial misconduct, the only sanction it could impose was a warning letter, which would become, in theory, part of the judge's record at the Supreme Court. If the seriousness of the misconduct warranted either suspension or dismissal, then the KY only had the power to recommend to the Supreme Court that the appropriate disciplinary action be brought. Soekotjo Soeparto, at Commissioner at the KY from 2005 until 2010, explained that the Supreme Court routinely ignored these recommendations and did not even bother to convene a hearing as it is required to by law when a suspension or dismissal was recommended by the KY.¹²² By March 2008, the KY had made 27 recommendations for disciplinary action, 12 of which were warning letters. The chairman of the KY reported that he had written numerous letters to the Supreme Court requesting a response but had received none.¹²³ It is not clear, therefore, whether even warning letters were being made part of the errant judges' records at the Supreme Court.

In very practical ways, the Constitutional Court was to make things worse by further handicapping the KY's mission. In a decision it handed down on August 23, 2006, the Constitutional Court took away what little sanction power the KY had, viz. the warning letter, and eliminated its right to summon and question judges suspected of misconduct. This effectively left the KY only with the power to recruit Supreme Court justices. But it did not have the power of appointment. The KY must submit its recruits to the DPR, which would then conduct a 'fit-and-proper' test to determine suitability. But, as far as supervision of lower court judges went, the KY had to cede that authority to the Supreme Court. Unfortunately, the Supreme Court has a poor record of disciplining its own members and lower court judges. Despite rampant corruption in the court system, only two judges have been disciplined in recent years.¹²⁴

Thus if the SBY administration and the DPR are serious about judicial reform, revision of Law No. 22/2004 would obviously be at the top of their legislative agenda.

¹²² Interview with Soekotjo Soeparto, April 19, 2007, in Jakarta. Mr. Soeparto was a Commissioner of the KY.

¹²³ 'Supreme Court snubs KY recommendation,' *Jakarta Post*, March 18, 2008.

¹²⁴ 'Crooked judges key obstacle to corruption fight: Indonesian panel,' *Business Times (Singapore)*, June 15, 2007.

The response was, indeed, initially positive with the DPR vowing to act swiftly to restore the KY's supervisory power.¹²⁵ But nearly three-and-a-half years later very little has been done by either the SBY administration or the DPR. In early January 2011, House Speaker Marzuki Ali announced that the revised KY law bill has been put on the priority list for the year.¹²⁶ Unfortunately, many legislators and the government have said much but done little about prioritizing this bill.¹²⁷

Perhaps it says something about the commitment that the SBY administration has about judicial reform that it 'forgot' to nominate new candidates to replace the outgoing KY commissioners whose terms were due to run out in mid-2010. The process was calculated to take about 6 months. First, there is the recruitment stage when possible candidates are sought out. Then, those short-listed are sent to the DPR for their fit-and-proper test. The commissioners were not appointed to staggered terms, and the terms of all seven members were due to expire at the end of July 2010. The KY's secretary-general had reportedly sent several letters to SBY reminding him of the impending expiry of the commissioners' terms. But he did not receive a response from the government until April 2010. A selection committee was not set up until late April, but a budget was not allocated so that it could not begin work immediately.¹²⁸ To avoid having an empty KY, SBY had to issue a Presidential Decree of dubious legality¹²⁹ extending the terms of six of the outgoing commissioners by two-and-a-half months.¹³⁰

As to the commitment of members of the DPR to judicial reform, the best that can be said is that they did their duty by voting to appoint seven of the 14 candidates presented by the government's selection committee. The Judiciary Watchdog Coalition, comprised of several NGOs, had expressed reservations about the suitability of five of the candidates, including Justice Said Abbas of the Supreme Court, who was

¹²⁵ 'House puts priority on Judicial Commission law,' *Jakarta Post*, August 28, 2006; 'House vows to reinstate powers of judicial body,' *Jakarta Post*, August 31, 2006.

¹²⁶ 'House speaker vows to finish KY law revision bill deliberation immediately,' *Jakarta Post*, January 12, 2011.

¹²⁷ The KY's power was partially restored by the enactment of Law No. 3/2009, which revised Law No. 5/2004 governing the Supreme Court. Article 11A of Law No. 3/2009 permitted the KY to bring dismissal proceedings against a Supreme Court justice for "conduct unbecoming" and for violations of ethical codes and behavior guidelines. But Law No. 3/2009 does not apply to lower court judges.

¹²⁸ 'Judicial Commission languishing from state neglect,' *Jakarta Post*, August 3, 2010.

¹²⁹ The President's power to extend the terms by presidential decree was questioned by a number of legislators who argued that the commissioners' terms could only be extended by *perpu* ('Some legislators Take Issue With Judicial Commission's Extension', *Jakarta Globe*, September 29, 2010).

¹³⁰ The term of Busyro Muqoddas, the KY chairman, was not extended because he had been reappointed to head the KPK, the Corruption Eradication Commission.

eventually appointed as a new commissioner.¹³¹ It is alleged that Abbas may have been involved in judicial corruption at the Supreme Court and while he was serving as an appellate judge.¹³² Yet, Abbas received 42 votes from the 55 members of the DPR's Commission III, which was responsible for conducting the 'fit-and-proper' test. This was the second highest number of votes cast by Commission III.¹³³ Clearly, then, a large number of Commission III members had no qualms about installing a candidate that many judiciary observers clearly thought as unqualified. Benny K. Harman (Democrat Party), chairman of Commission III, admitted that they had selected "the best of the worst" but pointed out that it was the government's selection committee that had sent them the pool of candidates from which they had to make their choice.¹³⁴

Early in SBY's second term,¹³⁵ there was an alleged conspiracy among senior officers in the National Police, the Attorney General's Office and the businessman brother of a graft suspect to bring down the Corruption Eradication Commission or KPK,¹³⁶ to go by its Indonesian-language acronym. Since its establishment, the KPK has had tremendous success in prosecuting and convicting corrupt businessmen and government officials as well as members of the DPR. Thus, while wildly popular and highly respected among the general population, the KPK is widely reviled by those who have been made or are potential targets of the KPK's prosecutorial efforts. Prosecutors working at the Attorney General's Office have been targeted. In one highly publicized case, a prosecutor working on a BLBI prosecution concerning Sjamsul Nursalim, Urip Tri Gunawan, was caught red-handed receiving a US\$660,000 bribe from Artalyta Suryani, a Nursalim associate. The KPK successfully prosecuted Gunawan before the Anti-Corruption Court, and Gunawan was sentenced to 20 years in prison.¹³⁷ Numerous legislators from a number of political parties have similarly been prosecuted by the KPK and convicted by the Anti-Corruption Court. Top-level officials at Bank Indonesia, the country's central bank, involved in a corruption scandal

¹³¹ 'Several candidates "pose threats" to Judicial Commission', *Jakarta Post*, September 28, 2010; 'Indonesian Watchdogs Question Records of Judicial Picks', *Jakarta Globe*, September 28, 2010.

¹³² 'Several candidates "pose threats" to Judicial Commission', *Jakarta Post*, September 28, 2010; 'Praying for Teeth,' *Tempo Magazine*, No. 15/XI, December 8-14, 2010.

¹³³ "'Best of the Worst" Selected for Indonesian Judicial Commission', *Jakarta Globe*, December 3, 2010.

¹³⁴ Ibid.

¹³⁵ Direct presidential elections were held in Indonesia for the second time on July 8, 2009. SBY was formally declared the winner on July 23rd.

¹³⁶ *Komisi Pemberantasan Korupsi*.

¹³⁷ 'Urip Sentenced to 20 Years Imprisonment, Rp 500m (US\$54,359.64) Fine', *Jakarta Post*, September 4, 2008.

were also successfully prosecuted, including Aulia Pohan, who is the father-in-law of one of SBY's sons.¹³⁸

It was only a matter of time before the elites decided to strike back. The conspiracy started with the prosecution by the KPK of one Anggoro Widjojo, a director of a telecommunications company who had been prosecuted for bribery in relation to a procurement of communications equipment by the Forestry Department. Anggoro quickly fled to Singapore, leaving his brother Anggodo to defend him. As part of his brother's defense strategy, Anggodo decided to emasculate the KPK by concocting a story in which two KPK commissioners, Chandra M. Hamzah and Bibit Samad Rianto, had extorted money from his brother in exchange for the KPK dropping the prosecution. If a successful extortion charge can be leveled against the two commissioners, then it was likely that the KPK would not be able to function since its chairman, Antasari Azhar, was already being prosecuted for murder, leaving only two commissioners in place. In addition, a successful extortion prosecution against two KPK commissioners would go a long way towards discrediting the KPK with the general public and certainly give Parliament, so many of whose members had been victims of the KPK, the excuse it needed to pass legislation to limit the Commission's powers.

Anggodo successfully convinced senior prosecutors in the Attorney General's Office who, because the KPK have had a number of their colleagues convicted for corruption, agreed to join the conspiracy. Anggodo has also had a prior relationship with these senior prosecutors: Wisnu Subroto, the deputy attorney general for intelligence, and Abdul Hakim Ritonga, the deputy attorney general.¹³⁹ Also convinced to become co-conspirators were senior members of the National Police, whose chief of detectives, Susno Doadji, had been wiretapped by the KPK allegedly soliciting a bribe in relation to the Bank Century scandal.¹⁴⁰ Doadji had boasted that the KPK's attempt to prosecute him was like a contest between a gecko and a crocodile, with the KPK cast in the role of the former.¹⁴¹ The Indonesian word for gecko is *cicak*. Doadji's remarks infur-

¹³⁸ 'Indonesia Court Jails President's In-Law For Graft', *Reuters*, June 17, 2009.

¹³⁹ 'Exposing Manipulation', *Tempo Magazine*, No. 10X, November 3-9, 2009. Both Subroto and Ritonga have since resigned their positions.

¹⁴⁰ Doadji was caught on tape allegedly soliciting a US\$1 million bribe from Budi Sampoerna, owner of a large cigarette manufacturer and one of Bank Century's largest depositor, in exchange for helping him withdraw his deposit from the collapsing bank ('Susno's Questionable Commission', *Tempo Magazine*, No. 03/X, September 15-21, 2009).

¹⁴¹ "'Gecko' scores against 'crocodile'", *Jakarta Post*, Saturday, November 7, 2009.

iated the public and soon brought about a popular movement calling itself Cicak, short for *Cintai Indonesia, Cintai KPK* (Love Indonesia, Love the KPK).¹⁴²

Anggodo's storyline was that the bribe was delivered by one Ary Muladi to the two commissioners' representative. But Muladi, who had once been part of the conspiracy, changed his mind and withdrew the testimony that he had given to the police. Anggodo had therefore lost a vital link in the extortion theory that was being spun. There was no evidence to show that Chandra and Bibit ever received any money from Anggodo. Meanwhile, the KPK had been wiretapping Anggodo's cellphone. His frequent calls to his brother Anggoro had already suggested that the two were hatching a plan to discredit Chandra and Bibit. Ary's about-turn caused Anggodo to call Subroto and Ritonga to discuss alternatives to Ary. Transcripts of these conversations, which had all been caught on tape, were soon circulating among journalists covering the Attorney General's Office and the KPK.¹⁴³

Instead of initiating an investigation of the conspiracy, SBY remained silent and even went so far as to issue a Perpu establishing a selection committee to find replacements for Chandra and Bibit as well as Antasari Azhar. According to Article 32 of Law No. 30/ 2002, the statute that governed the KPK, SBY had the right to dismiss a KPK commissioner who had been accused of a crime. It was this provision that permitted SBY to seek replacements for the three commissioners. Chandra and Bibit challenged the constitutionality of Article 32 before the Constitutional Court, arguing that it deprived them of their right to the presumption of innocence. The Court agreed and issued injunctive relief to Chandra and Bibit pending a final decision and ordered the KPK to produce the tapes on which the leaked transcripts were based.¹⁴⁴ The same day that the Constitutional Court handed down its decision, the police took Chandra and Bibit into custody.

The arrest sparked a Facebook campaign in support of the two commissioners, which started the day following their arrest. That same day, SBY publicly announced that he was powerless to intervene to stop the prosecution of the two commissioners which, it was becoming steadily evident, was based on trumped-up charges. But when

¹⁴² 'KPK Supporters Show Love For Little "Cicak" That Could', *Jakarta Globe*, July 13, 2009; 'Antigrift body wins moral support in face of enemy', *Jakarta Post*, September 17, 2009.

¹⁴³ 'Exposing Manipulation', *Tempo Magazine*, No. 10/X, November 3-9, 2009.

¹⁴⁴ Decision No. 133/PUU-VII/2009, dated October 29, 2009.

it became obvious that the Facebook campaign was steadily gaining momentum,¹⁴⁵ SBY finally took the initiative and established a fact-finding team, called the Team of Eight, chaired by respected human rights lawyer, Adnan Buyung Nasution, to determine whether the case against the two commissioners had any substance.¹⁴⁶ A week after it was established, the Team concluded that there was insufficient evidence for the prosecution to proceed to trial.¹⁴⁷ There was no link that could be shown between Anggodo and the two commissioners without Ary Muladi's testimony.

The day after the Team of Eight was established, the KPK tapes, revealing the conspiracy among Anggodo, high-ranking officials in the National Police and the Attorney General's Office, were played in a televised proceeding before the Constitutional Court. The tapes showed that the attempt on the part of the elites to bring down the KPK appeared to be real.¹⁴⁸ The fact that SBY had done nothing to counter the threat that had begun taking shape many months before, until the facts became practically indisputable, did not bode well for Indonesia's anti-corruption struggle. Polls showed that the public disapproved of the way he handled things.¹⁴⁹ Worse still, the KPK tapes hinted that SBY himself may have given his tacit approval to the conspirators.¹⁵⁰ The possibility was not too far-fetched since SBY himself had been made an indirect victim of the KPK's prosecutorial zeal when Aulia Pohan, his son's father-in-law, was convicted. In a perhaps unguarded moment, shortly after Pohan's conviction, SBY had been quoted as saying that the KPK's power should not go unchecked.¹⁵¹

On the positive side, SBY followed one of the recommendations made by his Team of Eight and established the Judicial Mafia Eradication Taskforce towards the end of 2009, which is chaired by Kuntoro Mangkusubroto, a respected technocrat who had done a creditable job administering the post-tsunami reconstruction work in

¹⁴⁵ By November 6th, a week after it started, the campaign had received 925,000 members ('Facebook People Power', *Asia Times*, November 7, 2009).

¹⁴⁶ 'Indonesia's Team of 8 Shows Signs of Bite, Not Just Bark,' *Jakarta Globe*, November 6, 2009; 'Fact-finding team to assess charges on KPK leaders', *Jakarta Post*, November 6, 2009.

¹⁴⁷ 'Indonesian President's Team Finds No Evidence Against KPK in Anticorruption Saga,' *Jakarta Globe*, November 10, 2009; 'Not enough evidence to charge KPK leaders: Team', *Jakarta Post*, November 9, 2009.

¹⁴⁸ Chief Justice Mahfud of the Constitutional Court explained that the Court did not authenticate the tapes because it was not a criminal proceeding but that the Court was nevertheless convinced that the tapes were authentic because the people involved had already admitted as much ('Mohammad Mahfud Md: The President should dare to be out of the box', *Tempo Magazine*, No. 11/X, November 10-16, 2009).

¹⁴⁹ 'SBY's Neutral Stance on KPK "Hurt His Image"', *Jakarta Globe*, November 9, 2009.

¹⁵⁰ 'Exposing Manipulation', *Tempo Magazine*, No. 10/X, November 3-9, 2009.

¹⁵¹ 'Ganging Up on the KPK', *Tempo Magazine*, No. 45/IX, July 07-13, 2009.

Aceh.¹⁵² A number of its members also have impressive reform credentials. But critics have been quick to point out that the Taskforce is severely handicapped by having only a two-year mandate and no authority to initiate prosecution.¹⁵³ Its task seems to be merely to recommend reform measures to the various branches of law enforcement,¹⁵⁴ and to monitor such measures and determine whether they have been properly implemented.¹⁵⁵ Its only sanction power appears to be the pressure of public opinion, which the Taskforce can generate to push recalcitrant law enforcement agencies into performing their jobs properly. To what extent the Taskforce can achieve its purported objective in the two years that it has remains to be seen. To date, its main achievement has been to expose the luxurious conditions that some inmates enjoyed at a Jakarta prison, including, especially, Artalyta Suryani, the woman convicted of bribing prosecutor Urip Tri Gunawan.¹⁵⁶ The Taskforce had recently come under intense criticism from certain members of the DPR when Gayus Tambunan, a corrupt tax official, complained at his sentencing hearing that Denny Indrayana, Taskforce secretary and presidential legal advisor, had pressured him to finger a group of companies controlled by Aburizal Bakrie, chairman of Golkar, that allegedly bribed him in an attempt to reduce the companies' tax obligations.¹⁵⁷ Indeed, it is unclear what future the Taskforce has. As a result of Tambunan's complaint, several political parties—with Golkar foremost among them—have called for the dissolution of the Taskforce.¹⁵⁸ Pressure has also been put on members of the Taskforce, with Denny Indrayana coming in for particular criticism. One Golkar politician has threatened to call on the National Police to bring Indrayana in for questioning.¹⁵⁹ Whatever its future, it may be argued that, with such a great deal of political pressure being put on the Taskforce, it is unlikely to produce major advances in the struggle against judicial corruption.

¹⁵² Mangkusubroto also chairs the UKP4 (*Unit Kerja Presiden bidang Pengawasan dan Pengendalian Pembangunan*), a taskforce of sorts, which SBY established early in his second term to ensure that his administration's development objectives are met. UKP4 reports directly to the president.

¹⁵³ 'Critics Quick to Judge Judicial Mafia Eradication Task Force', *Jakarta Globe*, January 7, 2010.

¹⁵⁴ The branches include the Attorney General's Office, the National Police, the KPK, the courts, and the prison system.

¹⁵⁵ 'Judicial corruption task force stepping into dragon's den', *Jakarta Post*, January 25, 2010.

¹⁵⁶ 'Indonesian rage over luxury jail cells for wealthy', *The Daily Caller*, January 13, 2010, available at: <http://dailycaller.com/2010/01/13/indonesian-rage-over-luxury-jail-cells-for-wealthy/>.

¹⁵⁷ 'Gayus Blasts Taskforce; SBY Upset', *Jakarta Post*, January 20, 2011; 'Gayus Accusations Give Golkar Ammo', *Jakarta Globe*, Saturday, January 22, 2011.

¹⁵⁸ 'Indonesian Judicial Mafia Busters "A Liability," Critics Say', *Jakarta Globe*, December 4, 2010; 'Golkar Accuses Mafia Task Force of "Messing Up" Legal System', *Jakarta Globe*, January 20, 2011.

¹⁵⁹ 'Golkar Accuses Mafia Task Force of "Messing Up" Legal System', *Jakarta Globe*, January 20, 2011.

Corruption, an essential element of patrimonial rule, remains rampant in Indonesia—in the judiciary as well as in government, the legislature, and among big businesses, both on the national as well as the local level. There is no evidence to suggest that the nature of corruption in the country has changed in any meaningful way. Corruption remains tightly bound up with power and politics. It would appear that members of the elite who benefit from patrimonial rule are still well in control of the state. In the legislature, Golkar still maintains a significant presence. But other parties, too, are controlled or influenced by members of the New Order elite. Gerindra and Hanura, for example, are controlled by Prabowo Subianto and Wiranto, respectively. Wiranto was commander-in-chief of the armed forces during the waning days of the New Order. Prabowo was commander of Kostrad, the Indonesian Army's Strategic Reserve Command and Soeharto's last military command before his elevation to the presidency, and, before that, of Kopassus, the special forces unit accused of atrocities in East Timor and of orchestrating the killing of student demonstrators in 1998. And he was, of course, Soeharto's son-in-law. PDI-P, Megawati's party, is also a political party deeply steeped in the New Order mindset, as argued in chapter 3. Even SBY's own Democrat Party is infiltrated by former Golkar members.

To be sure, there are reform-minded technocrats in SBY's cabinet. But it is doubtful whether they carry much influence in the government's policy formulation and policy implementation process. Sri Mulyani Indrawati, the most thorough-going reformer in SBY's cabinet, was most probably forced out, as discussed at the end of chapter 3, by the political machinations of Golkar chairman, Aburizal Bakrie, because her reforms were cutting deeply into his business interests. Vice President Boediono is reportedly an indecisive and timid person who tolerated a subordinate going over his head while he was finance minister.¹⁶⁰ One influential commentator said that Boediono's character traits would not serve him well in helping the government combat corruption.¹⁶¹ The few technocrats in SBY's cabinet are outnumbered and outgunned by politicians who are members of some of the parties discussed above because SBY insisted on forming an inclusive coalition government. The Coalition's Joint Secretariat, chaired by Aburizal Bakrie, and created in the wake of Sri Mulyani's ouster, could certainly act as a 'facilitating device' for the party cartel that Slater (2004) theorized particularly since one of its main functions is to help the government formulate policy. J.

¹⁶⁰ 'Boediono unfit to face big boys: Analysts', *Jakarta Post*, October 20, 2009.

¹⁶¹ Ibid.

Kristiadi, a senior analyst at the Centre for Strategic and International Studies, a neo-liberal think-tank in Jakarta, agrees when he suggested that the Joint Secretariat could very well be used by coalition members “to negotiate positions and projects.”¹⁶² More germane to this inquiry, the appointment of Patrialis Akbar as current minister of justice was particularly disappointing for the prospects of the rule of law as Akbar is reputed to lack the commitment necessary to combat the judicial mafia.¹⁶³

Even if we assume that SBY is personally clean of corruption, and there has been no solid evidence to the contrary, and that he is sincere in his desire to introduce reform, his hands may very well be tied, and there are very definite limits as to how far he can go, as indicated by his inability to retain Sri Mulyani as his finance minister in the face of political pressure exerted by Golkar chairman, Aburizal Bakrie. Reforms that cut too deeply into the political and economic interests of the elite are unlikely to be enacted or, if enacted, are unlikely to be properly implemented. As Damien Kingsbury, a prominent student of Indonesian politics and particularly of its armed forces, has put it:¹⁶⁴

Accountable, transparent representative government runs contrary to many entrenched interests, not least those that have much to financially lose from such a system, and much to gain from undermining it. In Indonesia, such entrenched interests include business figures able to buy political, *judicial* and military influence, corrupt politicians and, not least, the self-serving and self-enriching interests of the TNI.

(emphasis added) Thus, the vision of the *negara hukum* that lawyers and like-minded reformers tried and, at first glance, succeeded in bringing about through the establishment of the one-roof system may, in fact, prove illusory. The continuing sway of patrimonial rule in Indonesia suggests that that vision is still a long way off and remains, as yet, beyond reach.

IV. Conclusion

The one-roof system that lawyers and activists sought to establish after the downfall of Soeharto’s regime was intended to assure not only the political independence of the judiciary but also the competence and professionalism of its judges. As a result of the reforms, the court system would be routinely capable of rendering judgments that are logically coherent and free from the taint of political interference and

¹⁶² ‘Political Corruption Reaches Alarming Level: Watchdogs’, *Jakarta Post*, January 31, 2011.

¹⁶³ ‘New Indonesian Cabinet Disappoints Reform-Minded Analysts’, *New York Times*, October 22, 2009.

¹⁶⁴ ‘Indonesia’s Dark Forces Confront Its President’, *The Age* (Melbourne), January 22, 2010.

corruption. The system that reformers sought would therefore undermine the rule of discretion so vital to the continuation of patrimonial governance in Indonesia. Despite the fact *Reformasi* failed to bring about the social revolution normally necessary to bring about such a fundamental and radical change, reformers did indeed succeed in bringing the one-roof system to Indonesia.

This chapter has shown that the post-Cold War foreign policy of the United States and its allies coupled with a new paradigm in development theory, in both the political and economic spheres, brought pressure to bear on Indonesia's political elites to reform its judicial system and usher in the rule of law. In the immediate aftermath of the Asian financial crisis, the IMF even conditioned its help to resuscitate Indonesia's ailing economy upon the government agreeing to establish a special court to deal with the large numbers of bankruptcies that attended the economic collapse.¹⁶⁵ At the same time, pressures from within the country also continued to mount. President Habibie, Soeharto's successor, was too weak politically to resist openly the demands of reformers for an independent court system. The political elites also saw the need to defuse the increasingly palpable threat posed by those who demanded *Reformasi Total*. This situation made the introduction of a number of reforms, including the one-roof system, inevitable.

But, as the chapter subsequently showed, the one-roof system has not ushered in a competent, honest and politically independent judiciary to Indonesia, at least not in the short term. Judgments handed down by the courts, not least of all by the Supreme Court, suggest that political imperatives have continued to play an important role in judicial decision-making. Corruption, too, has continued to plague the judiciary. An examination of the political situation in Indonesia showed that many members of the New Order elite are still in positions of power and influence. They have continued to practice the style of politics that is supportive of the continuation of patrimonial government. Corruption and the rule of discretion continue to thrive. This chapter showed that this informal institutional continuity has made politicians in power, both in the legislature and the executive, reluctant to increase the pace of judicial reforms. While there has been no public refusal to carry out the reforms, continued foot-dragging has meant that the pace of reforms has been extremely slow. The next chapter deals with the establishment of the Constitutional Court, which has been widely

¹⁶⁵ See p. 70, *supra*, for further details of the reform program.

considered to be successful. But, as that chapter will show, that success must also be qualified.

Chapter 5

Constitutionalism, Judicial Review, and the *Mahkamah Konstitusi*: Treating Human Rights Seriously?

This chapter discusses the reformers' efforts to establish a constitutionally-limited government. Since its inception, Indonesia has always had a constitution of some sort, but the country's judiciary had never been empowered to review government action or laws for their constitutionality. The empowerment of the judiciary in this respect was a key goal of reformers anxious to secure for themselves a forum in which their fundamental rights can be defended. Through conflict and compromise, detailed below, the result was the establishment of the country's first Constitutional Court—the Mahkamah Konstitusi (MK).

The MK began hearing cases on August 16, 2003.¹ Thus far, reactions to the MK have been “mixed” (Harding & Leyland 2008: 136). On the plus side, Stockmann (2007: 100) stated that the MK “has enhanced democratic *rechtsstaat* principles in Indonesia”. Moreover, the Court has helped to dismantle the “legacy concerning legislation and legal culture” left by the country's previous authoritarian regimes’ (ibid.). Such positive views of the MK are, to a significant extent, well deserved. For example, the MK has increased transparency in judicial decision-making. The MK's decisions are read aloud in court on the day they are handed down. The decisions are also almost immediately available for download from the Court's website,² often accompanied by an English translation. Dissents are published along with the majority opinion. In addition, the website also contains minutes of the MK's proceedings. This transparency has enhanced the MK's legitimacy. Polls have shown that the Court is very favorably perceived by the public. It is seen as honest, fair and independent (ibid. at 99). Considering the low regard that Indonesians have for their judicial system generally, it is certainly fair to argue that the MK has been successful.

Another example is the easy access petitioners have to the MK. Its rules on standing are permissive and have allowed public interest cases to be heard by the Court. Petitions from NGOs have been accepted simply because their articles of incorporation have included the defense of constitutional rights (Harding & Leyland

¹ Law No. 24/2003. The MK Law was enacted on August 13, 2003. By Presidential Decree (Keppres) No. 147/M/2003, President Megawati Soekarnoputri officially appointed the nine justices of the MK on August 15, 2003.

² www.mahkamahkonstitusi.go.id.

2008: 129). Petitions have even been accepted when the petitioners have not been able to show that they have suffered actual damages to their constitutional rights. Butt (2006: 52) pointed out that the MK has shown a willingness to help petitioners develop arguments that would justify review instead of simply dismissing their cases. Easy access to the MK has made constitutional justice a reality rather than just window dressing in a country where justice of any kind has been hard to get.

On the minus side, the MK has handed down some controversial decisions that have tarnished its reputation in some quarters. The *Judicial Commission* case³ drew intense criticism from media commentators and lawyers alike (Butt 2007: 195). As already discussed in chapter 4, the Judicial Commission was established to help the Supreme Court, the *Mahkamah Agung* (MA), investigate complaints of judicial misconduct and to recommend, where appropriate, that sanctions be imposed by the MA. The case was brought by 31 MA judges who challenged the Commission's authority to investigate the conduct of and recommend sanctions against MA judges. While confirming that MA judges are covered by the definition of "judges" stated in the Commission's enabling law, the MK nevertheless declared portions of the law unconstitutional because permitting the Commission to supervise judges would infringe judicial independence and because the law failed to describe specifically how the Commission was to carry out its task of supervision. Essentially, the MK gutted the Commission's power to summon and question judges suspected of misconduct as well as all of its sanction powers, such as they were.⁴ Given the pervasiveness of judicial corruption, the MK's decision was seen as a blow to the country's efforts to create a clean and competent court system.

In another case decided later that same year, the MK was again seen as delivering a crippling blow to the country's efforts to stem the tide of corruption generally when it ruled that the country's extremely successful and well regarded Anti-Corruption Court unconstitutional because it did not have its own enabling law and because the different treatment corruption suspects were accorded in the Anti-

³ Decision No. 005/PUU-IV/2006.

⁴ The only sanction that the Judicial Commission could impose was to issue a written warning that theoretically becomes part of the judge's record at the MA. The Commission was never authorized to impose more serious sanctions (e.g., suspensions or dismissals) directly but only to recommend to the MA that such sanctions be imposed. The Commission had issued 13 written warnings and suspension recommendations. The MA has ignored every one of them. In those cases where suspension were recommended, the MA did not even bother to convene a hearing as required by law (Interview with Soekotjo Soeparto, Commissioner, in Jakarta, April 19, 2007).

Corruption Court compared to those accused of violating the same laws in the district courts led to a “duality” that would violate the constitutional guarantee of equality before the law.⁵ These cases brought the MK a certain notoriety and public suspicion that the Court was willing to overlook corruption and especially judicial corruption.⁶

As Butt (2007: 195) has argued, however, these criticisms are probably “overstated”. The MK’s reasoning in the *Judicial Commission* case, although perhaps not adequately developed, was not unreasonable (ibid.). It is defensible for the MK to favor judicial independence over accountability at this stage of Indonesia’s history given the political subjugation of the judiciary during both Guided Democracy and the New Order. Nor is it unreasonable for the MK, in the *Anti-Corruption Court* case, to prioritize the concept of equality before the law over the country’s attempts to eradicate corruption given the historical experience of unequal legal treatment different classes of Indonesians were accorded. Moreover, the MK took the precaution of giving the government three years in which to draft a new law to re-authorize the Anti-Corruption Court.

These reservations aside, however, has the MK succeeded in defending the human rights of ordinary Indonesians? After all, human rights are the theoretical justification for constitutionalism, that is, for limiting the state’s ability to enact laws that would be detrimental to the interests of minorities. Rights like the freedom of expression and association as well as equality and the due process of law are all designed to prevent the state from enacting laws that would infringe the rights of minorities by ensuring them a voice in the political arena. In a way, therefore, they are a means of insuring the democratic process itself by preventing the tyranny of the majority. Vindicating human rights is thus a fundamental purpose of judicial review. “By serving as a countermajoritarian institution,” as Ginsburg (2003: 22) has noted, “judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself.”

This chapter first examines whether the powers given to the MK are sufficient to safeguard these human rights by constraining the law-making powers of the government. It concludes that while those powers may be sufficient to check the law-making powers of the DPR, the national legislature, they constitute an insufficient

⁵ Decision No. 012-016-019/PUU-IV/2006.

⁶ ‘Decision on Judicial Commission condemned’, *Jakarta Post*, August 25, 2006; ‘Alarm Over Anti-Graft Court Axing’, *The Age* (Melbourne), February 15, 2007.

check on the law-making powers of the executive and those of local governments. The chapter then focuses on the lack of a constitutional complaint mechanism in the MK. This mechanism normally provides petitioners opportunity to ask a constitutional court to review government action that may impinge their constitutional rights. The chapter argues that the MK wasted a valuable opportunity to make up for this defect when it declared that its decisions would only have prospective effect. Finally, the chapter examines the reasons why Indonesia chose to establish a constitutional court with such limited powers to protect the human rights of ordinary Indonesians. It concludes that a powerful and independent constitutional court would have inflicted too great a systemic shock on existing power relations.

I. Jurisdictional Limitation to the MK's Power of Judicial Review

Article 24C of the 1945 Constitution and Article 10(1)(a) of Law No. 24/2003 governing the MK both state that the MK has the power to review *statutes* enacted by the DPR for their constitutionality.⁷ The MK's decision is final and binding. Thus cases of constitutional challenge against Indonesian statutes are to be determined by the MK in the first and final instance. There is no appeal from the MK's decision. Because the MK's power is limited to statutes, it is not empowered to review regulations issued by the executive branch or statutes and regulations issued by local government. Review powers over these legal instruments were specifically reserved for the MA by Article 24A(1) of the 1945 Constitution and by Article 31 of Law No. 5/2004 governing the MA.⁸ Interestingly, however, the MA's power is limited to determining whether executive branch and local regulations are consistent with statutes or regulations immediately above them in a hierarchy of laws.⁹ The MA is *not* authorized to

⁷ In addition to the power to review statutes for their constitutionality, the MK also has the power to (1) resolve turf disputes between state institutions; that is, disputes relating to their respective authority where such authority is derived from the 1945 Constitution, (2) determine the legality of government petitions to dissolve political parties, (3) resolve disputes regarding the results of general elections, and (4) decide whether an impeachment petition against the president or vice president brought by the DPR is legally valid and may be presented to the MPR for further proceedings. According to Mohamad Mahfud (2009), Chief Justice of the MK, the Court has decided ten cases relating turf disputes between state institutions and 45 cases relating to disputes over general election results between the time the Court was established in 2003 and early November 2008. So far, no cases relating to the dissolution of political parties and impeachment of the president or vice president have been brought before the MK. Cases relating to these powers of the MK will not be discussed here. See Mahfud (2009) for a discussion of these cases.

⁸ This review power was also given to the MA by Article 11(2)(b) of Law No. 4/2004 on the powers of the judiciary.

⁹ Article 7(1) of Law No. 10/2004, which provide the rules on the legislative process provided the hierarchy of laws as follows: (1) the 1945 Constitution, (2) statutes and *perpu's*, (3) government regulations,

review executive and local regulations for their constitutionality. Thus, it seems, the constitutionality of executive branch and local regulations have been exempted from judicial scrutiny altogether. But how big a problem is this?

A. The MK and Non-Statutory Laws

In a 1987 report, the International Commission of Jurists noted that there was “heavy reliance on executive action” in Indonesian law-making (Thoolen 1987: 55). In addition to the hierarchy of laws listed in Article 7(1) of Law No. 10/2004, there are also regulations issued by ministers of the various departments within the executive branch (ibid. at 57). Butt (2006: 66, n. 58) noted that government regulations, which the president enacts in order to implement statutes, are routinely issued to “deal with important issues not covered in an umbrella or source statute.” It is probably fair to conclude that this “heavy reliance on executive action” in law-making has resulted in a large number of important non-statutory laws being enacted in Indonesia, possibly even outnumbering laws enacted by the legislature. It seems, therefore, to be a fairly big problem. There is a large number of important laws in existence the constitutionality of which is beyond review by either the MK or the MA.

B. The MK and Local Legislation

Since 1999, the problem has become even bigger. Faced with the East Timor crisis and an on-going secessionist movement in Aceh, a politically weak President Habibie was forced to grant greater local autonomy to disaffected regions for “fear that more provinces might attempt to break away completely from Indonesia” (Seymour & Turner 2002: 36). But probably because of this very fear, decentralization away from Jakarta did not lead to greater provincial autonomy. Provinces were thought to be large enough to make secession a real possibility. Instead, greater autonomy was given to smaller political subdivisions (ibid. at 40). Specifically, Law No. 22/1999—the so-called Regional Autonomy Law—gave each *kabupaten* (regency) and *kota* (city) the power to govern and administer its respective jurisdiction in the interest of the lo-

(4) presidential regulations, and (5) *perda*’s. *Perpu*’s are interim regulations issued by the president in an emergency and must be ratified by the DPR before becoming statutes. The president issues government regulations (*peraturan pemerintah*) to implement statutes (arts. 1(5) and 10 of Law No. 10/2004) and presidential regulations (*peraturan presiden*) to implement government regulations (art. 11 of Law No. 10/2004).

cal population (Article 1(i)).¹⁰ Although autonomy was also given to provincial governments, Article 4(2) of the law stated that there was to be no hierarchical relationship between the provincial government and those at the regency or city levels. Thus, the chief executive of a regency (the *bupati*) or the mayor of a city (the *walikota*) is accountable to his/her respective legislature or DPRD¹¹ and not to the provincial governor.¹²

Among the powers given to regencies and cities was the authority to enact local legislation, the so-called *peraturan daerah* or *perda*. Chapter VI of the Regional Autonomy Law set forth the procedure that must be followed by local government. Article 69 stated that the local chief executive shall enact local regulations or *perda*'s with the consent of the local DPRD. This was later confirmed by Article 136(1) of Law No. 32/2004, which amended the 1999 statute, and by Law No. 10/2004 on rules that legislatures, in general, must observe when enacting laws. Bills pending before the DPRD must be made public by the local secretariat (Article 142); and the public has a right to be heard during all phases of legislation (Article 139). Once a bill has been passed by the DPRD, the chief executive has 30 days in which to enact it (Article 144(3)). If the chief executive fails to enact the bill within that period, the bill automatically becomes law (Article 144(4)). The law does not contain any provision dealing with vetoes by the chief executive. Rather, passage of a bill towards enactment assumes that both the chief executive and the DPRD have agreed upon the substance of the bill and its suitability for enactment.

Interestingly, however, Law No. 32/2004 does not provide any guidance as to the substantive contents of *perda*'s except to say that they must not be against the public interest and inconsistent with any superior national law (Article 136(4)). There is no specific mention that *perda*'s must not violate the 1945 Constitution but the requirement of constitutionality must be presumed since the 1945 Constitution sits at the top of the hierarchy of laws set forth in Article 7(1) of Law No. 10/2004. Article 138 does state, however, that *perda*'s must include the principle of equality before the law

¹⁰ A *kabupaten* is administratively at the same level as a *kota*. They are both political subdivisions of a province but with different characteristics. The former is usually geographically larger than the latter while the latter is typically more densely populated than the former. Their economies are also different, with agricultural activities being found almost exclusively in a *kabupaten*.

¹¹ *Dewan Perwakilan Rakyat Daerah* (Local People's representative Council).

¹² The provincial governor is technically accountable to the provincial DPRD (Article 30(2)) but s/he remains a representative of the central government (Article 30(4)) and remains accountable to it (Article 30(5)).

and government. And Article 145 reserves the right of the central government to invalidate any perda that it considers to have violated Article 136(4) of the law. The central government has 60 days in which to act (Article 145(3)). The local government may seek judicial review by the MA of the central government's decision to invalidate any perda (Article 145(5)). If the central government takes no action to invalidate a perda within 60 days, it shall be presumed valid (Article 145(7)).

Since the Regional Autonomy Law was enacted, there has been a proliferation of *shari'a*-inspired perda's; that is, inspired by Islamic religious laws. A recent count puts the number at 78 enacted in 52 regencies and cities or about 11 percent of all sub-provincial districts in Indonesia (Bush 2008). This count did not include local executive decrees (*keputusan*), instructions (*instruksi*), and circulars (*surat edaran*). Nor does it include bills (*rancangan perda*) (ibid.). The appearance of *shari'a*-inspired perda's has been sufficiently significant to generate "heated debate among Indonesians" (Salim 2007: 126). These perda's are often constitutionally dubious.

Although there is no clear constitutional requirement separating religion and the state, Article 29 of the 1945 Constitution "guarantees each and every citizen the freedom of religion" (emphasis added). In addition, Article 28E states that "each person is free to worship and practice the religion of his choice". It is therefore clear, as Salim (2007: 116) argued, that the right is conferred on "individuals, [and] not on any religious community." As such, "the government should deal with its citizens individually, not as religious groups" (ibid.). But *Shari'a*-inspired perda's, it may be argued, are exactly an attempt by local governments to treat its citizens as religious groups instead of as individuals. Moreover, since there is no single official state religion, Indonesia cannot be considered a theocratic state (ibid. at 115). Yet, as Muslim intellectual Dawam Rahardjo has argued, the very existence of *shari'a*-inspired perda's would turn Indonesia into a theocratic state since religious tenets would then have the compulsion of law. Instead of popular sovereignty (*kedaulatan rakyat*), he pointed out, there would be God's sovereignty.¹³ Whether these perda's are constitutionally valid is therefore a justiciable question that should be presented to the MK.

Local governments typically argue that they are not trying to force Islam down people's throats. Perda No. 5/2003 of Bulukumba Regency in South Sulawesi requir-

¹³ Rahardjo made these comments in the course of a broadcast of *Topik Minggu Ini* [This Week's Topic], a news program, aired by SCTV on August 9, 2006. An account of the program is available at <http://berita.liputan6.com/progsus/200608/127209/Menguji.Perda.Syariat.di.Ranah.Majemuk#> [Examining Shari'a-inspired Perda's in a Pluralistic Society].

ing Muslim dress for men and women specifically exempts non-Muslims. A similar requirement issued by Mayor of Padang,¹⁴ a city in West Sumatra, also exempts non-Muslim female students from wearing the *jilbab*, a headscarf. But this requirement has apparently caused non-Muslims a great deal of anxiety. Because the Mayoral Instruction contains a suggestion (*anjuran*) that non-Muslim female students also wear the *jilbab*, “in practice non-Muslim female students who do not wear a headscarf face the question: Why aren’t you following the instruction?” The “suggestion”, it is argued, that “someone wear the religious symbols of another faith is a form of coercion by the state.”¹⁵ There is also enough ambiguity in the Bulukumba perda to suggest that *all* citizens are “recommended” (*dihimbau*) to adhere to a Muslim dress code.¹⁶ This recommendation has, in fact, turned out to be mandatory in practice because non-Muslim women not wearing a *jilbab* are systematically denied public services to which they are otherwise entitled. Thus, although there is no specific constitutional separation between religion and the state, it could be argued that *shari’a*-inspired perda’s *do* pose constitutional problems because their enforcement often has the effect of limiting a person’s freedom of religion. Moreover, *shari’a*-inspired perda’s have the potential of transforming Indonesia’s secular government into a theocratic one like Iran’s.

Local governments also argue that these perda’s are not *shari’a*-inspired at all but have merely been enacted to deal with social problems such as gambling, public drunkenness and prostitution (Salim 2007: 126). Perda No. 8/2005 against prostitution enacted by the City of Tangerang is a case in point.¹⁷ Mayor Wahidin Halim denied that he was trying to impose Islam on the people of Tangerang. He argued that he was simply “trying to clean up public morals” in his city when he enacted the perda against prostitution. Mr. Halim, a member of the secular Golkar Party, admitted that Islamic

¹⁴ Instruksi Walikota No. 451.442/Binsos III/2005. The *anjuran* has recently been amended, making wearing the *jilbab* a *kewajiban yang tak tertulis* [an unwritten obligation]. At least four schools in Padang strictly enforce this “unwritten obligation” (‘In Padang, Islamic law is now imposed on all’, *AsiaNews*, March 24, 2008).

¹⁵ ‘Sharia-inspired bylaws the scourge of democracy?’ *Jakarta Post*, January 2, 2007.

¹⁶ “Citizens” or *masyarakat* is defined as persons who reside and work in the Bulukumba Regency. Although the perda is directed at white-collar workers employed in both the public and private sectors, university, high school and *madrasah* (Islamic boarding schools) students, Article 6(2) states that the general public (*masyarakat umum*) is recommended (*dihimbau*) to stick to a Muslim dress code on an everyday basis and not simply on formal occasions. This particular article did not limit the “recommendation” (*himbauan*) to Muslims. Since the definition of *masyarakat* did not exclude non-Muslims, one is left wondering whether the perda is somehow also applicable to non-Muslims despite the specific disclaimer in Article 13(1). In any case, Article 13(2) states that non-Muslims should adhere to dress codes provided by their respective religions.

¹⁷ Tangerang is a city located about 20 km west of the Indonesian capital, Jakarta. The national capital’s Soekarno-Hatta International Airport is located within its jurisdiction.

parties strongly supported his policies but denied it therefore followed that he and they necessarily share the same ideology.¹⁸ It is true that criminalizing prostitution is not unique to Islam. In the United States, prostitution is generally illegal except in Nevada¹⁹ and Rhode Island. In its history, the US government has also prohibited the manufacture and sale of intoxicating liquor, although it did not ban its consumption.²⁰

Salim (2007) would argue, however, that these perda's *are* inspired by *shari'a*. Typically, local politicians would enact these perda's to get Muslims to vote for them. This practice is particularly important in areas that are heavily Islamic such as South Sulawesi, West Java, and West Sumatra. In these areas, secular political parties are at a competitive disadvantage to Islamist parties.²¹ To compensate for this disadvantage, secular parties often enact *shari'a*-inspired perda's to establish their Islamic credentials (Bush 2008). Indeed, the vast majority of these perda's have, in fact, been enacted by mayors and regents from secular political parties. The mayors of Padang and Tangerang along with the Bulukumba regent, for example, are all politicians from the Golkar Party. This would be consistent with Platzdasch's (2009) analysis of the 2009 national legislative elections. He argued that Islamist parties as a group did not fare well in the elections not because Islam has waned as a political force, but that much of the Islamist agenda has been co-opted by the secular parties. President Yudhoyono's Democrat Party, for example, ended up supporting the Anti-Pornography Bill, originally sponsored by the Islamist PKS in the DPR. Yet, although a significant portion of the Indonesia's electorate favors some form of Islamic lifestyle, the majority is not comfortable with the complete *shari'a*ization of Indonesian society. But to be successful at the polls, secular political parties now have to take account of Islamic values and sensibilities.

Whether or not these perda's are *shari'a*-inspired, local laws like Tangerang's prohibition of prostitution are often constitutionally problematic because they typically affect women much more adversely than they do men. Arguably, this disparate impact

¹⁸ 'Spread of Islamic Law in Indonesia Takes Toll on Women', *New York Times* June 27, 2006.

¹⁹ Ironically, prostitution is illegal in Las Vegas and Reno, the two cities in Nevada renowned for gambling.

²⁰ The manufacture, sale, and shipment of intoxicating liquor was prohibited by the 18th Amendment to the US Constitution, ratified on January 29, 1919. The prohibition was repealed by the ratification of the 21st Amendment to the US Constitution on December 5, 1933.

²¹ Islamist parties include the PKS (*Partai Keadilan Sejahtera*, Prosperous Justice Party), the PPP (*Partai Persatuan Pembangunan*, United Development Party), and the PBB (*Partai Bulan Bintang*, Crescent Star Party).

upon women makes these perda's discriminatory. Article 28I(2) of the 1945 Constitution specifically guarantees citizens protection against any type discrimination. The Tangerang perda permits a locally-constituted civilian police force²² to arrest anyone found in public places such as roads and street corners, cinemas, hotels, cafés but also in private residences if his/ her "comportment or behavior" (*sikap atau perilaku*) would "arouse the suspicion" (*mencurigakan*) or "give the impression" (*menimbulkan suatu anggapan*) that s/he is a prostitute (Article 4(1) of Perda No. 8/2005).

C. Lilies Lindawati and the Tangerang Perda

On February 27, 2006, Lilies Lindawati, a pregnant restaurant worker, was arrested for prostitution while waiting for a public minivan²³ to take her home from work. She was suspected of being a prostitute because she was carrying lipstick and a make-up kit in her handbag. Because she could not produce her ID card and could not contact her husband, she was held overnight and tried the following morning. She was found guilty and fined Rp. 300,000 (about US\$30).²⁴ Because she could not afford the fine, she was jailed for three days.²⁵ The case has since become a *cause célèbre* and intensified the debate over *shari'a*-inspired perda's. Apparently, Lilies Lindawati was not the only woman arrested under the same perda. Twenty-six other women have been similarly arrested.²⁶ The acute embarrassment that Lilies Lindawati and the 26 other women suffered have since cowed similarly-situated poor women, making them afraid to be in the streets of Tangerang after dusk.²⁷ This has reportedly affected their livelihoods since many women work night shifts in the factories of this industrial city. Lilies Lindawati claimed that as many as "75 percent of union members 'are women who are now scared to go out at night, [although] many of them [may have no choice because they] must work overtime'."²⁸

²² To help them enforce perda's, Law No. 32/2004 authorizes local governments to establish local police units (*Satuan Polisi Pamong Praja*) (Article 148). Members of this local constabulary may be appointed as civil investigators to help investigate possible violations (Article 149(1)). In addition, Article 149(3) authorizes local governments to appoint any official to help investigate possible violations. Thus, local government has been given ample local law enforcement capability.

²³ Minivans and *bemo*'s [three-wheeled vehicles] ply the *kampung*'s [urban villages] where the streets are typically too narrow to be served by regular buses.

²⁴ Law No. 32/2004 authorizes the local government to impose sanctions for violations of perda's. Punishment is, however, limited to 6 months of incarceration or a fine of Rp. 50 million (Article 143(2)).

²⁵ 'Woman takes Tangerang mayor to court over prostitution bylaw', *Jakarta Post*, May 9, 2006.

²⁶ *Ibid.*

²⁷ 'Spread of Islamic Law in Indonesia Takes Toll on Women', *New York Times*, June 27, 2006.

²⁸ 'Lawyers take bylaw to Supreme Court', *Jakarta Post*, March 21, 2006.

D. MA Review of the Tangerang Perda

Along with two other women, and represented by a coalition of legal aid NGOs,²⁹ Lilies Lindawati petitioned the Supreme Court (*Mahkamah Agung*, MA) for judicial review of Perda No. 8/2005 on April 20, 2006. The MA's decision to deny the petition, handed down on March 1, 2007,³⁰ is arguably a good indication of the customary deference that the MA gives to legislatures. Historically, the MA has made very infrequent recourse to its review powers granted under Article 26 of Law No. 14/1970 and Article 31 of Law No. 14/ 1985. Indeed, as Harman (1991: 42) remarked, there is not a single record of the MA using its review powers between 1970 and 1991. Butt (2006: 10) noted that the MA typically rejects such petitions. In the petition filed by Lilies Lindawati, the MA looked only at whether, in enacting the perda, the Tangerang administration had followed proper procedures set forth in Law No. 32/2004 and Law No. 10/2004. Justice Djoko Sarwoko, acting as spokesman for the MA, remarked that the Tangerang administration had indeed followed the proper procedure, including taking into account the public's opinion. The MA also found that Perda No. 8/2005 was not inconsistent with higher law and, as such, was not "reviewable" (*tak diujimaterilkan*).³¹ It seems, however, that the only higher law by which the MA judged the legality of the perda was the Regional Autonomy Law.

In fact, Lilies Lindawati's petition had asked the MA to examine whether Perda No. 8/2005 was inconsistent with Law No. 7/1984 (which ratified the Convention on The Elimination of All Forms of Discrimination Against Women), Law No. 39/1999 on human rights, and Law No. 12/2005 on civil rights. The MA seems to have ignored these laws in its examination of the petition.³² Most importantly, the MA did not appear to have examined Article 4(1) of the perda, which the petitioner claimed was vague. Under Article 4(1), a person can be arrested for prostitution if her "comportment or behavior" aroused suspicion or could give the impression that the person is a prostitute. Lilies Lindawati and her co-petitioners argued that mere suspicion or im-

²⁹ *Tim Advokasi Perda Diskriminatif* (TAKDIR) consisted of LBH (*Lembaga Bantuan Hukum*, Legal Aid Institute) Jakarta, PBHI (*Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia*, Indonesian Legal Aid and Human Rights Association), LBH-APIK (*Lembaga Bantuan Hukum-Asosiasi Perempuan Indonesia Untuk Keadilan*, Legal Aid Institute-Indonesian Women's Association for Justice) and *Mitra Perempuan* (Women's Crisis Center).

³⁰ Decision No. 16 P/Hum/2006.

³¹ 'Perda Pelacuran Tangerang Tak Bertentangan dengan UU', *Gatra*, March 13, 2007.

³² The MA's decision is still unavailable to the public. What is known about the MA's decision in rejecting this petition came from a press conference convened on April 13, 2007 by Justice Djoko Sarwoko who acted as spokesman for the MA.

pression were insufficient grounds for an arrest. She pointed out that under the Indonesian Penal Code (KUHP), a person can only be prosecuted for attempting to commit a crime if she has shown her intent to commit such crime by taking initial steps towards its commission.³³ In other words, to be consistent with the country's Penal Code, a law against prostitution must ensure that a suspect can be arrested only if she has taken the first steps towards offering her services to prospective client.³⁴ Without this standard, enforcement of the perda would effectively mean that any woman not attired in a *jilbab* and otherwise conservatively dressed may be liable to arrest if she happened to be alone in a public place after sundown. The effect would be particularly onerous on non-Muslim women who, for work-related or other reasons, often find themselves in public places after dark. Thus one could reasonably argue that the Tangerang perda had the effect of discriminating against women and against non-Muslim women in particular. Whether or not the perda is constitutionally suspect is certainly a question worth asking the MK to decide. But, of course, the MK has no jurisdiction to decide the question. With the MA's reluctance to exercise its review powers, many local laws like the Tangerang perda may never be challenged despite their dubious constitutionality.

E. Race-Based Discrimination in Yogyakarta

Not all discriminatory perda's are *shari'a*-inspired. A circular issued by the Yogyakarta Governor's office prohibits Indonesian citizens of foreign ethnic origins from owning land within the province.³⁵ The circular dates back to the New Order when there were many discriminatory laws enacted against Chinese Indonesians. But since the 2nd Amendment of the 1945 Constitution, the circular would be unconstitutional on its face. Article 28D(1) states that everyone has the right to equal treatment before the law. Moreover, Article 28I(2) states that everyone has the right to be free from discrimination on whatever ground. Discrimination based on ethnicity would certainly be covered by Article 28I(2). Under the circular, Chinese Indonesians are

³³ *Kitab Undang-Undang Hukum Pidana*. Article 53(1) states that 'Mencoba melakukan kejahatan di pidana, jika niat untuk itu telah ternyata dari adanya permulaan pelaksanaan, dan tidak selesainya pelaksanaan itu, bukan semata-mata disebabkan karena kehendaknya sendiri.' [An attempt to commit a crime may be prosecuted, if the accused has shown his intent to commit such crime by taking the initial steps towards its commission but has involuntarily failed to complete it.]

³⁴ 'MA Tolak Permohonan Uji Materiil Perda Pelacuran Tangerang', *Hukumonline.com* March 16, 2007.

³⁵ Surat Edaran Gubernur DIY (Daerah Istimewa Yogyakarta) PA VIII No. K.898/I/A/1975.

only permitted to own a “right to build” [*Hak Guna Bangunan*] but not a “right to own” [*Hak Milik*]. Thus Chinese Indonesians looking to build on a piece of land must relinquish their right to own that land and obtain instead a right to build upon it. The bureaucratic red tape required to make the change is costly. In one recorded instance, the cost was Rp. 3 million compared to Rp. 350,000 for a fee simple conveyance.³⁶ Thus, Indonesian citizens of Chinese descent are not only forbidden from owning land in Yogyakarta, they are also expected to pay considerably more money than *pribumi* citizens when building a house.³⁷

The circular was challenged at the Administrative Court of Yogyakarta in 2000 by Budi Setyagraha, an ethnic Chinese member of the Yogyakarta DPRD. The trial court ruled in favor of Setyagraha but its decision was reversed on appeal. A member of the local bureaucracy responsible for surveys, measurement and cartography confirmed that the circular is still in effect.³⁸ One of the main functions of the MK is to ensure that unconstitutional laws are expunged from the statute books. But with its limited jurisdiction, the MK is only able to act against a very small number of laws. Aside from *perda*’s and other local regulations, there are many national regulations that may be of dubious constitutionality. Conscious of the fact that these regulations are beyond the reach of the MK, the government seems to be deliberately favoring regulations instead of statutes when making important laws (Butt 2006: 67).

II. The Lack of a Constitutional Complaint Mechanism

The rules limiting the MK’s jurisdiction to the review of statutes enacted by the national parliament means that unconstitutional action or inaction by the executive, the judiciary, and local governments is also beyond judicial scrutiny. In other words, the MK lacks a constitutional complaint mechanism. Such a mechanism is a feature of other constitutional courts. For example, the German Federal Constitutional Court receives a large number of constitutional complaints. Indeed, the “most significant decisions” of that court have concerned such complaints and is the subject matter of “more than 50 percent of its published opinions” (Kommers & Russell 2008: 203). Constitutional complaints have similarly made up the bulk of the docket of the South Korean

³⁶ ‘Persamaan Hak Bagi Etnis Tionghoa’, *Kompas*, August 18, 2006.

³⁷ *Pribumi* is the term used to identify native Indonesians as opposed to Indonesians of foreign ethnic extraction.

³⁸ ‘WNI Keturunan di DIY Tidak Punya Hak Milik Tanah’, *Kompas*, September 13, 2006.

Constitutional Court (Hendrianto 2010). The lack of such an important jurisdiction in the MK is indeed striking considering its importance not only for keeping unconstitutional laws off the statute books but also for ensuring that state officials conduct themselves according to the constitution.³⁹

A. *The Masykur Abdul Kadir Case*

It is true that the MK will declare as unconstitutional the statute upon which the administrative actions, judicial decisions or government regulations are based. A famous example is the *Masykur Abdul Kadir* case, decided by the MK in 2004.⁴⁰ Masykur Abdul Kadir had been convicted in 2003 by the Denpasar District Court for aiding and abetting the bombers who blew up two Bali nightclubs in 2002, killing 202 persons (including 88 Australians and 28 Britons) and sentenced to 15 years' imprisonment.⁴¹ He was convicted for violating Law No. 15/2003. The law was initially issued as Perpu (Interim Regulation) No. 1/2002 on October 18, 2002, six days after the terrorist killings occurred (Butt & Hansell 2004: 178).⁴² On the same day, President Megawati Soekarnoputri also issued Perpu No. 2/2002. The sole purpose of the second perpu was to allow the Bali bombing suspects to be tried under the first perpu. In other words, the second perpu permitted the retroactive application of the first perpu, which had been designed to make the arrest and conviction of terrorists much easier (ibid.).

It was this second perpu, eventually enacted as Law No. 16/2003, which Abdul Kadir challenged as unconstitutional. Abdul Kadir pointed out that under Article 28I(1) of the 1945 Constitution, "the right not to be prosecuted on the basis of retroactive legislation [is a] fundamental human right[] that shall not be curtailed *under any*

³⁹ Indonesia does have administrative courts (*Pengadilan Tata Usaha Negara*—PTUN). It is unclear, however, whether the PTUN's jurisdiction extend to the constitutionality of administrative actions. Article 53(2)a. of Law No. 9/2004 on the PTUN merely states reviewable administrative actions are those that "contravene existing laws and regulations" [*bertentangan dengan peraturan perundang-undangan yang berlaku*]. The language used is not all that different from that used to limit the MA's review powers. Whether existing laws include the 1945 Constitution is far from clear. However, Bedner (2001: 171-190) discussed a number of PTUN cases that had constitutional significance. In one case he discussed (p. 178), a PTUN trial court referred to a petitioner's rights to the freedom of expression although a procedural violation had been enough to justify rescinding that particular administrative action. In another case discussed (p. 185), however, a different PTUN trial court said that a petitioner's constitutional right to counsel was not valid grounds for rescinding that particular administrative action.

⁴⁰ Decision No. 013/PUU-I/2003.

⁴¹ 'Bali bombers may be freed after court rules against terror laws', *The Independent*, July 24, 2004.

⁴² Upon ratification by the DPR on April 4, 2003, Perpu No. 1/2002 was enacted as Law No. 15/2003 (Butt & Hansell 2004: 178). The discussion of the *Masykur Abdul Kadir* case in this chapter draws heavily from Butt & Hansell (2004).

circumstances” (emphasis added). He argued that the phrase “under any circumstances” indicated that the right was absolute and could not be abrogated. In addition, he argued that permitting the government to abrogate such an absolute right was tantamount to giving it the power to act in an arbitrary manner towards its citizens (Butt & Hansell 2004: 179). In a 5-4 decision, the majority of the MK agreed with Abdul Kadir and struck down Law No. 16/2003 as unconstitutional. The majority pointed out that the bombings, abhorrent though they were, did not amount to genocide or a crime against humanity. As such, the exceptions to the ban on the retroactive application of laws in those types of cases provided by international law do not apply. Absent these exceptions, the unambiguousness of the phrase “under any circumstances” required that Abdul Kadir’s right be upheld and Law No. 16/2003 be declared unconstitutional (ibid. at 179-180).⁴³

Everyone assumed that the MK’s decision meant that Law No. 16/2003 was unconstitutional as of its enactment, which is the rule followed in most jurisdictions. Logically, because Abdul Kadir had been convicted under a constitutionally invalid law, it followed that he should therefore be set free. Even more worrying was the fact that the same law had been used to convict the Bali bombers’ ring leaders. In total, 32 persons involved in the bombing had been convicted under the law.⁴⁴ Not surprisingly, the MK’s decision immediately stirred great consternation in Indonesia and abroad, especially in Australia from where many of the victims had come. The outrage expressed among Australians forced the opposition Labor Party to pledge support for Prime Minister John Howard’s government in demanding justice for the victims.⁴⁵ Alexander Downer, Howard’s foreign minister, immediately contacted the Indonesian government to express Australia’s concern.

The majority opinion in the *Masykur Abdul Kadir* case was a principled one, however; Tim Lindsey and Simon Butt, long-time Australian commentators of the Indonesian legal system, called it a “watershed decision” that was “one of the better ar-

⁴³ The dissenting judges argued that although the bombings did not amount to genocide or a crime against humanity, their socio-political and economic repercussions were sufficiently serious to warrant the application of the exceptions, allowed by international law, to the ban on the retroactive application of laws. Moreover, the dissenters pointed out, bombing with intent to kill had always been a crime even before the passage of the new anti-terrorism law. These two factors, they argued, warranted the dismissal of Abdul Kadir’s petition (Butt & Hansell 2004: 180).

⁴⁴ ‘Bali bombers may be freed after court rules against terror laws’, *The Independent*, July 24, 2004.

⁴⁵ ‘Bali bombers may go free in legal shock’, *The Age* (Melbourne), July 24, 2004.

gued and reasoned judgments ever handed down by an Indonesian court.”⁴⁶ On the other hand, it was clearly unacceptable in many quarters, both in Indonesia and abroad, for the Bali bombers to be set free. That they had committed a criminal act that killed many innocent people was established beyond a reasonable doubt. Furthermore, Imam Samudra, the alleged mastermind, admitted as much.⁴⁷ In a classic case, perhaps, of ‘hard cases make bad law’, the chief justice of the MK, along with the country’s minister of justice, declared that the MK’s decision in the *Masykur Abdul Kadir* case would only have prospective effect, meaning Abdul Kadir and his fellow conspirators would remain in jail. The chief justice explained that Article 58 of Law No. 22/2004, the MK’s enabling statute, stated that a statute “being reviewed by the MK remains valid until there is a decision declaring that the statute conflicts with the constitution.”⁴⁸ As such, he argued, Law No. 16/2003 became constitutionally invalid only as of the date the MK handed down its decision in the *Masykur Abdul Kadir* case; that is, July 23, 2004. Since Abdul Kadir was convicted before this date, his conviction, under a law that was then still constitutionally valid, remained binding. The chief justice’s statement is specious. As Lindsey and Butt pointed out, provisions like Article 58 “are common around the globe and are usually used to maintain the status quo until a decision is made.”⁴⁹ They simply mean that the law in question will be presumed constitutional pending the court’s decision on its constitutionality. There is nothing in the MK Law or its Elucidation that would suggest that Article 58 should be read in a way other than what Lindsey and Butt had suggested.

Although the chief justice’s statement, strictly speaking, is not law since it was not part of the MK’s decision, it has nevertheless posited a rule that would bind the Court in the future. Thenceforth, all petitioners seeking a remedy for a conviction that may have been made under a constitutionally invalid law would not personally benefit from the MK’s decision, were it, in fact, to declare such law unconstitutional. Many people, in particular the victims’ families, would not feel aggrieved with the ultimate outcome of *Masykur Abdul Kadir* case. Understandably so. Yet, the chief justice’s ruling should still be considered a travesty of justice. In Austria, where the constitu-

⁴⁶ ‘Indonesian Judiciary in Constitutional Crisis, Part 1’, *Jakarta Post*, August 6, 2004.

⁴⁷ ‘We killed too many, say Bali bombers’, *The Sunday Times* (London), March 2, 2008.

⁴⁸ “Undang-undang yang diuji oleh Mahkamah Konstitusi tetap berlaku, sebelum ada putusan yang menyatakan bahwa undang-undang tersebut bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.”

⁴⁹ ‘Indonesian Judiciary in Crisis, Part 2’, *Jakarta Post*, August 7, 2004.

tional court follows the same prospective-only rule, an exception is generally made in criminal cases where the prospect of a long prison sentence imposed under a constitutionally invalid law has been deemed inconsistent with all conventional notions of justice.⁵⁰ The injustice of such a rule would doubly apply where capital punishment had been imposed. But an even worse consequence of the chief justice's statement may be the disuse into which judicial review as a legal means of protecting human rights in Indonesia may fall. After all, what would be the point of petitioning the MK, if its decision, even if favorable, would make absolutely no difference to one's own case?

As Tim Lindsey and Simon Butt explained, however, the real tragedy is that this 'prospective-only' rule was totally avoidable.⁵¹ There were other legal means to keep the Bali bombers in jail. A re-trial might have been a possibility because double jeopardy arguably would not have attached. Since Law No. 16/2003 was unconstitutional, one could argue a conviction made under the law was equally unconstitutional. Because both Indonesia's Human Rights Law and Criminal Code provide that double jeopardy would only attach if a "binding" decision had been handed down, an unconstitutional decision could be considered never to have taken place since it was never legally binding.⁵² Another means Lindsey and Butt explored was using Law No. 15/2003 to prosecute the Bali bombers for acts committed *after* the law came into effect, such as being members of a terrorist organization or carrying weapons or evading capture for crimes punishable under other legal provisions. It is unclear which of these strategies would have worked to everyone's satisfaction. The point, however, is that alternative theories were available and should have been explored. There was no need for the Chief Justice to make a statement that gave away one of the MK's most important means of defending the human rights of ordinary Indonesians against unconstitutional government actions.

B. *The Eggy Sudjana Case*

Unfortunately, the Chief Justice's statement in the wake of the *Masykur Abdul Kadir* case may have indeed led to even weaker human rights protection by the judiciary. If *Masykur Abdul Kadir* meant that a petitioner would stay in jail if the MK hand-

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

ed down its decision after the petitioner's conviction, then the *Eggy Sudjana* case⁵³ means that even if the MK handed down its ruling *before* a trial court has had a chance to convict, a petitioner would *still go to jail* as long as the alleged offense had taken place prior to the MK's ruling! Eggy Sudjana, a lawyer and Muslim labor activist, admitted that he went to see the chairman of the KPK⁵⁴ to confirm a rumor that businessman Harry Tanoesoedibjo had given one of President Yudhoyono's cabinet ministers, two of his closest advisors and the president's son each a Jaguar (a luxury automobile) as consideration for them arranging a tête-à-tête between him and the president.⁵⁵ It was a rumor that later turned out to have been false. Upon exiting the chairman's office, he was surrounded by a group of journalist who wanted to know what Eggy's business with the chairman had been. Foolishly, Eggy told them.⁵⁶

Under the Indonesian Penal Code (KUHP), it was a criminal offense to defame the president or vice president in public. By telling reporters the subject of his conversation with the KPK's chairman, Eggy had fulfilled all the elements of the crime since a false accusation of corruption could certainly be deemed defamatory. Six months later, on July 7, 2006, Eggy was indicted before the Central Jakarta District Court. He was charged with violating Articles 134 and 136*bis* of the KUHP and scheduled for trial beginning on August 3, 2006. Perhaps aware of the *Masykur Abdul Kadir* case and the chief justice's statement following the case, Eggy wasted no time and promptly filed a petition with the MK on July 23, 2006, challenging the constitutionality of the articles he was charged under. Unfortunately, however, there was nothing under Indonesian law that would have allowed Eggy to move the district court to suspend his trial pending the outcome of his petition before the MK. So, his trial proceeded as scheduled.

On December 6, 2006, the MK handed down its decision in Eggy's case. The Court agreed with Eggy's petition and concluded that Articles 134 and 136*bis* of the KUHP violated Articles 27(1), 28D(1), and 28E(1) and (2) of the 1945 Constitution. The Court found that the offending articles had privileged the president and vice president over ordinary Indonesian citizens because defamation, as defined in these articles, was the same crime as defined in Articles 310-321 of the KUHP, which applied gener-

⁵³ Decision No. 013-022/PUU-IV/2006.

⁵⁴ *Komisi Pemberantasan Korupsi* [Corruption Eradication Commission].

⁵⁵ 'Jakarta Police to Summon Eggy Sudjana Again', *Antara News*, January 13, 2006.

⁵⁶ 'Eggi Sudjana Didakwa Menghina Presiden' ['Eggi Sudjana Accused of Insulting President'], *Hukumonline.com*, July 21, 2006.

ally. Yet, those convicted under Articles 134 and 136*bis* faced a much more severe punishment (6 years' imprisonment) than those convicted under the general defamation articles (9 months' imprisonment). The remarkable difference in punishment provided by the two sets of articles for essentially the same crime would therefore violate Article 27(1) of the 1945 Constitution, which provides that "all citizens [including the president and vice president] have equal status before the law". At the same time, Articles 134 and 136*bis* of the KUHP violated Article 28D(1) of the Constitution because a protest statement or opinion could easily be construed as defamation under the offending articles. As such, they undermined the legal certainty guaranteed to all Indonesians by Article 28D(1). In addition, Articles 134 and 136*bis* of the KUHP were also constitutionally invalid because they violated the right to the free expression of opinions guaranteed by Article 28E(2) and (3) of the Constitution. In this regard, the Court noted that Articles 134 and 136*bis* of the KUHP could easily be abused by the government to repress legitimate political opposition.

Eggy presented the MK's decision as part of his defense, but to little effect.⁵⁷ On February 22, 2007, the Central Jakarta District Court convicted Eggy for violating the very articles of the KUHP that the MK had declared to be unconstitutional two months previously. The panel of trial judges hearing Eggy's case had obviously paid careful attention to the statement that the Chief Justice of the MK had made in conjunction with the *Masykur Abdul Kadir* case. In their minds, Articles 134 and 136*bis* of the KUHP had only become unconstitutional after December 6, 2006, almost a year after Eggy had committed his offense on January 3, 2006. Therefore, according to this reasoning, when Eggy committed his offense against the president, the laws in question had definitely been valid constitutionally.⁵⁸ Admittedly, there is a certain logical consistency to the district court's reasoning albeit, perhaps, the type of "foolish" consistency of which Emerson had written.⁵⁹ The result was clearly perverse.

The decision betrayed a kind of cold heartlessness that would offend the ordinary person's sense of justice. This is perhaps doubly the case because during Eggy's trial it had been revealed that Eggy had not been the first person to spread the rumor.

⁵⁷ 'Hakim Diminta Tidak Penuhi Titipan Kekuasaan' ['Judge Asked Not to Use Full Power'], *Suara Karya*, February 19, 2007.

⁵⁸ 'Vonis Eggy Sudjana: Majelis Hakim Membangkang' ['Eggy Sudjana Verdict: Judges' Panel Opposed'], *Suara Karya*, February 26, 2007.

⁵⁹ Ralph Waldo Emerson, an American philosopher and poet, wrote in his essay, *Self-Reliance* (1830), that "A foolish consistency is the hobgoblin of little minds."

Taufiqurrahman Ruki, chairman of the KPK, testified that he had heard the rumor before Eggy came to see him on January 3, 2006. More importantly, on the same day as Ruki's testimony, Agung Laksono, Speaker of the DPR, had also testified that he had delivered Eggy's letter of apology to the president and that Sudi Silalahi, the cabinet minister implicated in the corruption rumor, had told Laksono that the president had accepted Eggy's apology. In addition, it was also revealed that on September 7, 2006, the president had actually written Eggy a letter accepting his apology.⁶⁰ It would be fair to assume, therefore, that the president himself had considered the matter closed. That the prosecution went ahead was only because, under Articles 134 and 136*bis* of the KUHP, the president, the injured party here, need not press charges for an indictment to be brought. It is entirely possible, therefore, that this was simply a case of an overzealous prosecutor seeking to buff up his résumé. As is so often the case in these circumstances, however, the result was tragic for the Indonesian system of justice.

But the real tragedy, perhaps, was the wasted opportunity that the MK could have seized in the *Masykur Abdul Kadir* case by insisting that Law No. 16/2003 was unconstitutional as of its enactment. Such a move would have gone a long way towards remedying the MK's lack of a constitutional complaint mechanism. People injured by constitutionally dubious government or judicial action could then, at least, petition the MK to have the statute that authorized such action annulled as unconstitutional and actually obtain a meaningful relief from the Court instead of a symbolic victory that does nothing to fix their predicament. There was a risk, of course, that such a move in the wake of the *Masykur Abdul Kadir* case might have resulted in the Court's holding being ignored by the government that was, at that point, clearly concerned to be seen to be doing its part in the so-called "Global War on Terror". Such an outcome would have diminished the MK's credibility. Yet, the path that the chief justice took, it could be argued, was equally detrimental to the Court's prestige as a forum in which a petitioner can actually get justice against an unconstitutional and unfair government action. As things stand, the MK would deserve the reputation of being toothless in preventing the government from abusing the human rights guaranteed to all Indonesians under their Constitution.

⁶⁰ 'Sidang Penghinaan Presiden—KPK Telah Tindaklanjuti Isu Bagi-Bagi Mobil Jaguar' ['Hearing on Insult to President—KPK Already Followed Up on Issue of Divvying Up Jaguars'], *Voice of Human Rights*, November 2, 2006.

III. Why a Constitutional Court?

Although the MK should be congratulated for having the courage to make principled decisions in politically sensitive cases, it is clear that there are severe limitations in what the Court can do to protect the human rights of ordinary Indonesians against unconstitutional government action. It has no power to review non-statutory laws and laws enacted by local government. These laws, as shown above, can often be unconstitutional. The MK also lacks a constitutional complaint mechanism, which means that it is equally powerless to check government action that is premised upon an unconstitutional interpretation of otherwise valid laws. It is true that Indonesia has administrative courts, in which such illegal actions can be challenged. But it is uncertain whether the administrative courts have the jurisdiction to evaluate administrative acts for their constitutionality. In any case, all final appeals from administrative courts go to the MA, which has always had an attitude of deference to the government. Moreover, there should only be one court that has the ultimate authority to speak on constitutional matters given the centralized approach to constitutional adjudication that Indonesia has chosen.

A. Reformasi and Judicial Review

Why did Indonesia create a constitutional court with such limited powers to protect the human rights of its citizens against arbitrary and discretionary government action? Was such a court what reformers, described in chapter 3, envisioned? This seems doubtful. In the same way that those reformers intended the one-roof system, discussed in chapter 4, as a vehicle for re-introducing the rule of law to Indonesia, so they intended judicial review as the means of restoring constitutionalism to the country.

Constitutional democracy had existed briefly in Indonesia between 1950 and 1957. But a succession of unstable parliamentary governments during this period, compounded by a number of open rebellions against the authority of the central government in Jakarta, finally led President Soekarno to declare martial law on March 14, 1957. It proved to be the “death blow to the parliamentary system” (Lev 1966: 12). It provided the army with a legitimate reason to take a direct role in politics and thereaf-

ter to engage in anti-party activities.⁶¹ This eventually gave Soekarno the political rationale and wherewithal to dissolve the *Konstituante*, the Constitutional Assembly, which had been popularly elected to deliberate and draft a permanent Indonesian constitution, and to reimpose by decree, on July 5, 1959, the largely authoritarian 1945 Constitution.⁶²

During Guided Democracy, Soekarno's populist-nationalist regime, the government committed numerous unconstitutional acts in the implementation of its policies. For example, Soekarno dissolved the DPR, the national legislature, when it rejected a draft budget that he had proposed (Indrayana 2008: 110).⁶³ But the most traumatic for many constitutionally-minded Indonesians was Soekarno's decision to give himself the power to intervene at will in the judicial process if, in his discretion, the intrusion was warranted to safeguard the revolution or was in the national interest (Harman & Hendardi 1991: vii).⁶⁴ To legal academics, lawyers and many of the middle class generally, the only way to constrain such excessive discretion in the executive's law-making powers was to subject government action to the scrutiny of judicial review (*ibid.*). Giving the MA the power to review statutes for their constitutionality became one of two chief demands—the other being judicial independence through the one-roof system—made by the “law-movements” that surfaced during the early years of Soeharto's New Order.⁶⁵ Lev (1978: 56-59) pointed out that demands for American-style judicial review had a fairly deeply-rooted history in Indonesia and had surfaced even during the colonial period. It had certainly been debated, albeit rejected, in

⁶¹ As with most impositions of martial law, civil and political liberties were sharply curtailed (Lev 1966: 59-74).

⁶² The 1945 Constitution, drafted in the midst of revolution, was intended to be temporary. It was replaced by the 1949 federal constitution, adopted after the Round Table Conference held in The Hague, The Netherlands, during which formal Indonesian independence was negotiated. It was favored by the Dutch and accepted by the Indonesians as a means of getting international recognition for the country's independence. It was replaced by the 1950 Constitution shortly after the constituent states of the federal republic gave up their sovereignty in favor of a unitary republic. The 1950 Constitution was also meant to be temporary pending a definitive constitution to be drafted by the *Konstituante*.

⁶³ Presidential Decree No. 3/1960. Indrayana (2008: 110) argued that this action was unconstitutional because it contradicted the Elucidation of the 1945 Constitution (Section VII of “System of Government”). When the 1945 Constitution was reinstated in 1959, the Elucidation was deemed to have become part of it and thus carried the same weight as the text of the Constitution (Bourchier 1996: 89, n. 30).

⁶⁴ Art. 19 of Law No. 19/1964. The Elucidation of Article 24 of the 1945 Constitution stated that the Judiciary is independent and free from government interference.

⁶⁵ Lev (1978: 39) defined “law-movements” as “persistent demands to subject political authority and common social and economic processes to limits defined by a body of conceptually autonomous rules and applied by a similarly autonomous legal system.” The demand of these “law-movements” as it related to judicial independence and the rule of law has already been discussed in Chapter 4.

1945 during deliberations over the country's proposed constitution (ibid. at 57). But it was only during the late 1960s that these demands became imbued with a "great sense of public purpose" and received "widespread support" (ibid. at 56).

Initially encouraged by the rule-of-law rhetoric of the new regime, proponents of these "law-movements" soon turned to pessimism, however, when it became obvious, with the passage of Law No. 14/1970, that their demands for constitutional restraints on the government's law-making powers were to be disappointed. Article 26(1) of the new law did endow the MA with review powers but only with respect to regulations below the level of statutes. The MA was to determine the legality of such regulations only with reference to their controlling statutes and not to the constitution. Moreover, under Article 26(2), the MA could only exercise its review powers at cassation (Harman 1991: 41-42). Mulya Lubis (1991: 112) argued that the typically long wait between first-instance judgment and cassation might result in the petitioner suffering irreparable damage during the interim. He also pointed out that execution of the MA's judgments in these cases was left to the government authority concerned (ibid.). The article made no provisions for sanctions in the case of non-compliance with the MA's orders. Worse still, Mulya Lubis pointed out, the MA could invalidate regulations that are constitutional when reviewing them against unconstitutional statutes (ibid. at 110)! In any case, the MA seldom used its review powers during the New Order. Harman (1991: 42) remarked that from 1970 to 1991, or over 20 years of the law's existence, there was not a single record of the MA ever reviewing the legality of regulations despite the existence of many regulations that contradict their governing statutes.⁶⁶

Despite the passage of the 1970 law, or perhaps because of it, the law-movements that first surfaced after the downfall of Guided Democracy never quite abated during the New Order. After the latter fell in 1998, they again came to the forefront as part of *Reformasi*'s demand for fundamental change. Harman (2005: 394-400) argued that there was an epistemological continuity in these law-movements' understanding of constitutionalism from Muhammad Yamin's conception through the *Konstituante* and the struggle during the mid- to late-1960s to *Reformasi*. In the

⁶⁶ The MA's review powers were also governed by Article 31 of Law No. 14/1985 on the powers of the Supreme Court. The language in this statute tracked the language of the 1970 statute.

BPUPKI⁶⁷ debates predating independence, Yamin had advocated a system of checks-and-balances for Indonesia's constitution, including giving the MA the power to review statutes and regulations for their constitutionality (ibid.). In Yamin's view, without judicial review, the constitution would not be an effective constraint against government overreaching.⁶⁸ The protection of human rights was central to this understanding of constitutionalism. Human rights, as Lev (1993: 152) pointed out, was regarded as "an ideological lever [to be used] against the state by prescribing areas impervious to discretionary political and bureaucratic power." Harman (2005) argued that reformers after the downfall of the New Order sought to introduce judicial review to Indonesia specifically to protect these rights because they formed an integral part of the democratic constitutionalism these reformers wanted for their country.⁶⁹ So, what happened to derail the reformers' ambitions for judicial review?

B. *The MK and Constitutional Amendment Process*

The MK was born out of Indonesia's efforts to amend the largely authoritarian 1945 Constitution. Unlike Indonesia's previous effort to draft a constitution during the second half of the 1950s, when Indonesians elected representatives to the Constitutional Assembly, the *Konstituante*,⁷⁰ the effort at amending the 1945 Constitution after the fall of Soeharto's regime did not involve a specialized assembly that had been popularly elected for the sole purpose of carrying out the project. Instead, the task was

⁶⁷ *Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia* (Investigating Committee for the Preparation of Indonesia's Independence).

⁶⁸ This viewpoint did not have the support of the majority of the BPUPKI and was expressly rejected by Soepomo, a leading *adat* law scholar Soekarno appointed to chair the BPUPKI's subcommittee tasked with drafting the constitution, the PKPUD (*Panitia Ketijl Perantjang Undang-Undang Dasar*). This PKPUD, as Bourchier (1996:90) pointed out, was dominated by those who were predisposed to "a strong, centralised, non-Islamic state favourable both to the Japanese and to [Soekarno]" who, like Soepomo, favored "a strong authoritarian state" (ibid. at 84). Significantly, Yamin, a leading constitutional scholar, was explicitly excluded from the PKPUD (ibid. at 90). Yamin later voted against the draft constitution the PKPUD presented for approval to the BPUPKI on July 16, 1945 (ibid. at 97).

⁶⁹ The MPR opted for the Kelsenian model of judicial review in establishing the MK rather than investing these powers in the MA. The Kelsenian model (named after Hans Kelsen, an Austrian constitutional law scholar) posits a centralized system of judicial review versus the decentralized or so-called Marshallian model (named after Chief Justice John Marshall who was credited with establishing the concept of judicial review in American jurisprudence) that exists in the United States. Under the Kelsenian model, judicial review of the constitutionality of statutes is vested only in one court whereas in the US model, judicial review is within the competence of all courts of general jurisdiction. Harman (2005: 433-448) argued that there was much to commend the US model but that one of the main reasons the Kelsenian system was adopted was the distrust for and lack of confidence in the MA's ability and willingness to do the job.

⁷⁰ For a comprehensive look at the *Konstituante*, see Nasution (1992).

performed by the MPR,⁷¹ the super-legislature whose sole function during the New Order had been to elect the president and to establish the GBHN,⁷² the broad outlines of state policy, every five years. But unlike Soeharto's MPR, which was comprised of 500 elected members of the DPR and 500 regional and functional representatives, all of whom were appointed by the former president, the MPR in 1999 consisted of 700 members: (1) the 500 members of the DPR, (2) the 135 appointed regional representatives, and (3) the 65 appointed representatives of functional groups.⁷³ Thus, only 238 of its 700 members had been appointed while 462 had been elected at the 1999 general elections.⁷⁴ To an appreciable extent, therefore, the 1999-2004 MPR enjoyed a certain legitimacy when compared to its previous incarnations.

At least, this was the perception at the beginning of the constitutional amendment process. But the MPR's legitimacy quickly and steadily diminished throughout the whole process. The sense of public disappointment extended not only to the MPR's appointed members but also to the elected members of the DPR (Indrayana 2008: 339-343). Recall that this was the same DPR that helped to put Abdurrahman Wahid in the presidency but which then took the lead to impeach him, as pointed out Chapter 3 and further elaborated below, when the president reneged on a political quid pro quo that would have amounted to a loss of an important source illicit revenue. Accordingly, one could reasonably argue that the informal institution of corruption and the accompanying rule of discretion remained widespread among members of the 1999-2004 DPR.

This should not have been that much of a surprise. As Table 1 shows, Golkar, Soeharto's party, had an impressive number of seats in the DPR: second only to the PDI-P, the party led by Megawati Soekarnoputri, Wahid's vice president and his eventual successor. Kingsbury (2005: 318) remarked that corruption worsened during Megawati's presidency and that "[h]er attempts to rein corruption were at best half-heart-

⁷¹ *Majelis Permusyawaratan Rakyat* [People's Consultative Assembly]. The PDI-P's position as the biggest faction of the MPR meant that its continually ambivalent position towards the necessity for any constitutional reform made drafting a completely new constitution, as opposed to amending the 1945 Constitution, politically impractical (Indrayana 2008: 162-163). Under the 1945 Constitution, the procedure for constitutional amendment was governed by Article 37, which delegated the task to the MPR (ibid. at 163-165).

⁷² *Garis-Garis Besar Haluan Negara*. The MPR lost this function as of the 3rd Amendment to the 1945 Constitution.

⁷³ The structure of the post-New Order MPR was regulated by Law No. 4/1999, enacted by B.J. Habibie.

⁷⁴ 38 members of the DPR were appointed by the military.

ed”. Moreover, as has been pointed out above, despite being a new political party, the PDI-P was in truth the successor organization to the PDI,⁷⁵ one of the two parties Soeharto created to act as a token opposition and one in which Megawati had played a leading role. Thus, Megawati gained most of her political experience during Soeharto’s regime and, not surprisingly, her political behavior “seemed to derive from a New Order way of looking at the world” (McIntyre 2005: 136).⁷⁶

Table 1
The 1999-2004 DPR

Party	# of seats	% of seats
PDI-P	153	30.6
Golkar	120	24.0
PPP	58	11.6
PKB	51	10.2
PAN	34	6.8
PBB	13	2.6
Others ⁷⁷	33	5.2
TNI/Polri	38	7.6
Total	500	100.0

Source: Indrayana (2008: 152)

The PPP,⁷⁸ as the other token opposition party Soeharto created, was also an artifice of the New Order. Together these three parties controlled over 66 percent of the DPR. In short, many of the parties that comprised the 1999-2004 DPR were political organizations that were well-conditioned by, and adept at benefiting from, the informal institutions of the New Order.

To a significant extent, the 1999-2004 MPR also reflected the DPR’s receptiveness to the informal institutions established during the New Order and Guided Democracy. Once again, as Table 2 shows, Golkar along with PDI-P and PPP dominated the MPR. Here, as in the DPR, they were joined by TNI/Polri, which represented the interest of the military and the police force, both backbones of the New Order’s machinery of repression and the prime beneficiaries of the regime’s politics of patrimonialism.

⁷⁵ *Partai Demokrasi Indonesia* [Indonesian Democratic Party] was composed of secular nationalist parties that had been forced to amalgamate into a single party.

⁷⁶ Megawati Soekarnoputri’s political views has been discussed in greater detail in Chapter 3.

⁷⁷ There were 15 political parties that fell into this grouping.

⁷⁸ *Partai Persatuan Pembangunan* [United development Party] was composed of Islamist parties that had been forced to amalgamate into a single party.

Table 2
The 1999-2004 MPR

Factions⁷⁹	# of seats	% of seats
PDI-P	185	26.6
Golkar	182	26.2
UG ⁸⁰	73	10.5
PPP	70	10.1
PKB	57	8.2
<i>Reformasi</i> ⁸¹	49	7.1
TNI/Polri	38	5.5
KKI ⁸²	14	2.0
PBB	13	1.9
PDU ⁸³	9	1.3
PDKB ⁸⁴	5	0.7
Total	695⁸⁵	100.0

Source: Indrayana (2008: 156).

Note: The appointed regional representatives did not form one faction but joined other factions and parties represented in the MPR: 62 joined Golkar, 32 joined the PDI-P, and the rest were dispersed among the other factions. The number of seats allocated to each faction in this table includes those regional representatives.

But it was not only the presence of New Order stalwarts in the MPR that made a genuine constitutional change impossible. To a great extent, it was also the weakness of the emerging democratic structure and its continuing reliance on the well-established informal institutions of previous patrimonial regimes. Corruption, in other words, continued to play a central role in post-Soeharto Indonesian politics. This is what made Indrayana's comment (2008: 153) that only 23 percent (116 members) of the 1999-2004 DPR had previously served in parliament somewhat beside the point. Indonesian political parties did not, and for the most part still do not, campaign on the basis of competing policy platforms. In any case, living under two successive authoritarian regimes has jaded many Indonesians, particularly those who inhabit the lower strata of

⁷⁹ A faction (*fraksi*) can consist of a single political party or a coalition of a number of parties. Parties with a small number of seats tend to form such coalitions.

⁸⁰ UG (*Utusan Golongan*) consisted of appointed representatives of functional groups, e.g., cooperatives, labor unions, etc.

⁸¹ This faction consisted of PAN and PK.

⁸² The *Kesatuan Bangsa Indonesia* (Indonesian National Unity) faction consisted of members of the PDI, the IPKI, the PNI (Massa Marhaen), the PNI (Front Marhaen), the PKP, the PP, the PBI, and the PKD. This was a coalition of secular nationalists.

⁸³ The *Perserikatan Daulat Ummat* (Union of Muslim Sovereignty) faction consisted of members of the PNU, the PKU, the PSII, the PPIIM, and the PDR.

⁸⁴ *Partai Demokrasi Kasih Bangsa* (Love the Nation Democratic Party) is a Christian-based political party.

⁸⁵ For obvious reasons, the five representatives from East Timor did not attend.

society, into believing that elections and whichever party gains power make little to no practical difference to their daily lives. This fact made competing on the basis of policy differences somewhat pointless. Thus, the only effective way that political parties can get people to vote for them is to buy their votes. Accordingly, elections in Indonesia have become a contest about which party can distribute as much money to as many people as possible.

Of course, vote-buying in a country as large as Indonesia requires that political parties have access to considerable amounts of money. This is probably more true of the newer political parties than of an older party like Golkar with its large war chest and highly-developed system of fund-raising. Like it or not, therefore, new political parties like PAN and PKB or even the PDI-P, with their smaller war chests and inexperienced fund raisers, typically have to resort to extra-legal methods of campaign financing. One method is to milk state-owned enterprises or other state agencies like Bulog, the State Logistics Agency (Iwan 2002: 74-75). As discussed below, this source of funds was more easily accessible for parties that have a cabinet seat. Another source is contributions from wealthy persons and corporations in defiance of campaign-financing rules that limit the size of such contributions. A third way is to sell legislation by accepting bribes from people and corporations or other organizations seeking to have the DPR enact laws favorable to them (ibid. at 77-85; 95-98).⁸⁶ Hence, albeit in a slightly different way, corruption has remained a vitally important informal institution for the maintenance of political power after *Reformasi*.

C. Judicial Review: Empowering the Judiciary?

Implicit in this system of money politics was the continuing subjugation of the judiciary, since a clean, competent and independent court system would effectively imply the system's destruction. Yet, many of the legislators newly elected to the DPR had also been political outsiders during the New Order and had sometimes been at the receiving end of its politically-subjugated system of justice. As such, they also had an ideological commitment to a stronger and more independent judiciary. It is in the context of this tension that the introduction of judicial review and, ultimately, of the MK must be understood. Even among factions that supported the introduction of judicial

⁸⁶ The practice of buying and selling legislation as well as government appointments that require DPR approval will be discussed in greater detail in Chapter 6.

review, the attitude was ambivalent at best when the demands of practical politics conflicted with ideology.

The threshold issues that the MPR grappled with during the constitutional amendment process was whether giving the MA the power to review statutes for their constitutionality, a persistent demand of reformers, would lead to the empowerment of the judiciary and whether such a development was politically desirable. Thus although the protection of human rights was the original goal of reformers, the focus of the initial debate shifted instead to the issue of checks and balances among the three branches of government. These issues were hashed out during the meetings of PAH III,⁸⁷ the Ad Hoc Committee that the MPR had specifically established to deal with the details of the proposed amendments. Most of the debates concerning the MK were handled by these Ad Hoc Committees, which were comprised of fewer than 50 members. The seats allocated in these committees mirrored the seat allocation of the MPR. In addition, the MPR also established Commissions to review the work done by the Ad Hoc Committees. The Commissions had more members than the committees. Commission A that was established on August 11, 2000 to review the work of Ad Hoc Committee I, for example, had 227 members. With each subsequent Annual Sessions of the MPR, new Ad Hoc Committees and Commissions were established.

PAH III was succeeded by PAH I on November 25, 1999, which was, in turn, succeeded by another PAH I on September 6, 2000. The first Commission A was established on August 11, 2000 to review the work done by PAH I established the previous November. A second Commission A was established on November 4, 2001, to review the work done by PAH I established in 2000. PAH III held a total of seven meetings between October 7th and 13th, 1999. PAH I, established in 1999, held a total of 51 meetings between November 29, 1999, and July 29, 2000, while PAH I, established in 2000, held a total of 39 meetings between September 6, 2000 and October 22, 2001. Meanwhile, the Commission A established in 2000 held a total of six meetings between August 11th and 14th, 2001, while the Commission A established in 2001 also held a total of six meetings between November 4th and 8th, 2001 (Indrayana 2008: *passim*). Note that issues relating to matters other than judicial review were discussed during the meetings of the Ad Hoc Committees and Commissions.

⁸⁷ *Panitia Ad Hoc III* [Ad Hoc Committee III].

PAH III held its first meeting on October 7, 1999. Predictably, Golkar and TNI/Polri argued against giving the country's Supreme Court, the *Mahkamah Agung* (MA), the power to review statutes for their constitutionality. At this stage, the idea of creating a separate constitutional court had not yet been broached. Golkar and TNI/Polri were joined by the *Reformasi* faction, an alliance between PAN⁸⁸ and PK.⁸⁹ Both of these latter parties were new to Indonesian politics, having been established only after the fall of the New Order. But some of their leaders were experienced players who had first cut their political teeth under Soeharto's rule. PAN, for example, was founded by Amien Rais, an Islamist politician who was involved in ICMI, the Islamist political organization, which Soeharto had helped to establish as part of the regime's corporatist strategy for political co-optation.

These factions, later joined by the PDI-P, argued that statutes were the joint product of the DPR and the government. Thus, to permit the MA to review this product would be tantamount to elevating the MA above the executive and the legislature (Harman 2005: 275). Although they conceded that judicial review was an important facet of the system of checks and balances among the three branches of government, they argued that giving the MA the power to review statutes would destroy the system of separation of powers, in which the three branches were considered co-equal, by endowing the judiciary with supervisory power over the executive and the legislature. As previously pointed out, under the European tradition, from which colonial-era Indonesia received substantially all of the blueprint for its system of government, the separation of powers doctrine was based on "an extreme form of [the] division of labor", in which the executive, the legislature, and the judiciary are each totally sovereign in their respective spheres, such that no branch of government has supervisory or review power over another (Pompe 2005: 12-13, quoting Shapiro (1981: 31)). This is different from the "*balance* of powers system" that prevails in the United States, where each branch was designed to act as a check upon the other two (ibid. at 13, original emphasis). By sticking to the European model, these parties supported judicial review only to the extent of endowing the MA's existing review powers with constitutional legitimacy. Recall that at that time the MA's limited review powers were only authorized by statutes. In other words, for these factions, the issue was limited to enshrining

⁸⁸ *Partai Amanat Nasional* [National Mandate Party].

⁸⁹ *Partai Keadilan* [Justice Party].

within the Constitution the powers that the MA already possessed and not about extending those powers to cover statutes enacted by the DPR (ibid. at 275-277).

On the other side of this debate stood the UG,⁹⁰ the PKB⁹¹ and the PBB.⁹² These factions favored extending the MA's review powers to cover statutes. They argued that the only way to empower the judiciary relative to the other two branches of government was precisely to give the MA greater review powers. Only in this way would progress be made towards establishing the system of checks and balances that had been sorely lacking during the New Order. They argued, moreover, that without full review powers vested within the MA, the establishment of the *negara hukum* in Indonesia was not likely to be possible (ibid. at 277-278). Thus, for these factions also, it was not really for the purpose of protecting human rights or even of ensuring the constitutionality of statutes or non-statutory laws that judicial review was to be introduced to Indonesia. Rather, judicial review was to serve a more pointedly political purpose of redressing the imbalance of power among the three branches of government. They were, in essence, asking for a fundamental constitutional change away from the European concept of the separation of powers, outlined above, towards the American model of the "*balance of powers*" (Pompe 2005: 13, original emphasis).

Both sides of the debate maintained their respective positions and failed to come to any kind of consensus by the time that the MPR ratified the First Constitutional Amendment almost two weeks later on October 19, 1999. A little over a month after that, on November 25th, the MPR resumed its task of amending the 1945 Constitution when it established PAH I—which consisted of 44 members, reflecting the factions' seat allocations in the MPR—to take over the work that PAH III had been doing during the MPR's 1999 General Session. From this date until the first quarter of 2000, PAH I held hearings to solicit the opinion of a number of stakeholders and experts. For example, MA Justices and representatives of IKAHI, the Indonesian Judges' Association, were invited to share their views on judicial review. Also invited were the YLBHI and PBHI, both legal aid organizations, and Ikadin, the Indonesian Bar Association. In addition, PAH I invited various constitutional law experts from several uni-

⁹⁰ UG (*Utusan Golongan*) consisted of appointed representatives of functional groups, e.g., cooperatives, labor unions, etc.

⁹¹ *Partai Kebangkitan Bangsa* [National Awakening Party].

⁹² *Partai Bulan Bintang* [Crescent Moon & Star Party]. The crescent moon and star is the symbol of Islam.

versities to solicit their views. Finally, PAH I sent a delegation to 21 foreign countries on a fact-finding mission.

It was only during the subsequent meetings of PAH I, starting in the second quarter of 2000, that the concept of a constitutional court first began to emerge. To a significant extent, the debates that took place in PAH I from this point until July 29th—when the Committee held its final meeting before the MPR’s 2000 Annual Session, held from August 7th through 18th—continued to center on the empowerment of the judiciary, whether such a development was desirable and what role judicial review had to play in it. Once the concept of a constitutional court began to gain traction in these debates, however, the focus shifted to the issue of where such a constitutional court would fit in the general architecture of Indonesian government.

Most of the factions involved, with the exception of the UG, initially rejected the option that would clearly go the longest way towards a judicial renewal and eventual empowerment: that is, establishing the proposed constitutional court within the judicial branch but as an independent institution not accountable to the MA. Instead, many factions argued for vesting review powers over statutes within the legislative branch, where the process could be better politically controlled. For example, at the 33rd meeting of PAH I, on May 22nd, Golkar representative, Theo L. Sambuaga, proposed that the MPR “function as a constitutional court whenever a charge is brought that a statute is unconstitutional” (MK 2008: 285). The PDU faction supported this position and proposed that the MPR be vested with the power to appoint and fire constitutional judges and that the constitutional court be made accountable to the MPR (*ibid.*). Golkar’s Sambuaga also proposed that, as an adjunct of the MPR, the constitutional court be an ad hoc body to be constituted only at such times as the MPR itself is convened (*ibid.* at 286).

At PAH I’s 41st Meeting on June 8th, another Golkar representative, Agun Gunandjar Sudarsa, elaborated on Sambuaga’s proposal by suggesting that the MA be the judicial institution empowered to request the MPR to convene the constitutional court to hear complaints about the unconstitutionality of statutes (*ibid.*). The PBB also chimed in with the proposal that the MPR select the constitutional judges and that such judges be selected from a pool consisting of senior and retired MA judges as well as constitutional law experts and statesmen. Further, it was argued that the chief justice of the MA should also function as chief judge of the constitutional court (*ibid.* at 289). The progression of the PBB’s position is interesting because it had originally been in

favor of increasing the MA's review powers to cover statutes during the PAH III debates, which had taken place the previous October. But when it came to vesting these powers in a new and politically untested judicial institution, the PBB clearly became concerned about the details of the constitutional court and argued for staffing it with politically true and tested MA judges.

By July 25th, at PAH I's 51st meeting, the majority of the factions had agreed that review powers should reside in the judicial branch rather than the legislature. Only the PPP and TNI/Polri still insisted on vesting review powers in the MPR.⁹³ Still subject to debate, however, was whether review powers over statutes should be given to the MA or to a constitutional court. In addition, there was continuing debate as to the proposed constitutional court's position in the institutional hierarchy. Only the UG argued in favor of establishing a constitutional court as part of the judicial branch but independent of the MA. It is noteworthy that at this stage of the debate, a progressive minority within the PDI-P argued alongside the UG for an independent constitutional court to be established as part of the judiciary. Dissent within the PDI-P became even more apparent about a month later on August 13th when Commission A met to review the results of PAH I's deliberations.⁹⁴ But the party as a whole continued to call for a constitutional court to be established as a "chamber" of the MA.

By the end of the 6th meeting of Commission A, on August 14th, no consensus had been achieved. The factions were split into three groups. The first group, consisting of (i) the UG, (ii) the KKI (a coalition of non-Muslim nationalists), and (iii) a progressive minority of PDI-P, wanted the establishment of a constitutional court that would be independent of the MA but still within the judicial branch. They argued that since the court's function is a judicial one, it should be part of the judicial branch. Moreover, this group wanted to insure that the court lay beyond the MA's sphere of influence. The second group, consisting of (i) the PDU (Islamist coalition), (ii) the PPP, (iii) PDKB (a Christian party), (iv) *Reformasi* (PAN & PK), (v) TNI/Polri, and (vi) the majority of the PDI-P, wanted the establishment of a constitutional court as a "chamber" of the MA. The third group continued to argue in favor of vesting review powers in the MPR and not within the judicial branch. This group consisted of (i)

⁹³ A conservative minority within the PDI-P sided with PPP and TNI/Polri in demanding that review powers be established within the MPR.

⁹⁴ Commission A was established on August 11, 2000, on the date that the 2000 MPR Annual Session convened its 6th Plenary Session. The Commission consisted of 227 members.

Golkar, (ii) the PKB, and (iii) a second, more conservative, minority of the PDI-P. Because of the continuing lack of consensus, the MPR decided to issue Decree No. III/2000 on August 18th giving review powers over statutes to itself while delegating the review of lower-level laws to the MA before voting to ratify the 2nd Amendment to the Constitution the following day. This, then, was the status quo when the MPR established PAH I on September 6th to continue the debates in the following annual session.

Throughout these debates, the practical realities of political life constantly intruded. President Abdurrahman Wahid, who had come to power on the back of an unstable coalition more intent on blocking Megawati's path to the presidency than on electing him president (Kingsbury 2005: 286), had begun to turn against some of the very people who helped to put him in power. As quid pro quo for their support, Wahid had agreed to include them in his cabinet. The PDI-P, Golkar, PKB, PPP, PAN and TNI/Polri were all represented (ibid. at 289-290). As Slater (2004, 2006) has argued, participation in the cabinet was an important way for political parties to access off-budget funds available at the various government departments, particularly in "wet" (*basah*) departments like Finance and State-Owned Enterprises. Such access, Iwan (2002) argued, was necessary for political survival.

But because the resulting cabinet size (35 portfolios) made it unwieldy, Wahid chose to govern by avoiding his ministers entirely and creating his own "night cabinet" (*kabinet malam*) consisting of close friends and advisors (Kingsbury 2005: 286). Worse still, from the perspective of his coalition partners, Wahid had begun tampering with his own cabinet and sacking his then-political allies from key positions. General Wiranto (TNI), his coordinating minister for political affairs & security, was the first to go on February 13, 2000. About two months later, he sacked his finance minister, Laksamana Sukardi (PDI-P) and, during that same month, his trade minister, Jusuf Kalla (Golkar). Throwing down the gauntlet entirely, Wahid then reshuffled his entire cabinet in August, firing all his ministers and reducing the cabinet from 35 to 26 portfolios (Slater 2004: 73). These actions united Wahid's former allies in opposition against him. For over a year, this confrontation between Wahid and the DPR continually intruded into the debates in PAH I over the constitutional court.

Legally, the MPR's power to impeach Wahid was constitutionally dubious. As Indrayana (2008: 229-230) pointed out, the 1945 Constitution at that time contained no provision for the impeachment of the president. Although the Elucidation of the 1945

Constitution indicated that the MPR had the power to compel the president to appear before a Special Session (*Sidang Istimewa*) of the Assembly to account for his actions if there was a case to believe that he had violated state policy (*haluan negara*), the Elucidation was silent on whether such a Special Session would have the power to impeach Wahid (*ibid.*). Not surprisingly, this issue had never been tested judicially during either Guided Democracy or the New Order.

But there was statutory support for supposing that the MPR had such power in two of its decrees: Decree No. III/1978 and Decree No. II/1999. Decree No. III/ 1978 outlined the procedures the MPR had to follow in case it could clearly determine that the president had violated state policy. Decree No. II/1999 merely added another ground for impeachment, viz. acting in violation of the Constitution (Indrayana 2008: 230). The issue remained, however, whether the MPR had the authority to issue those decrees in the first place in the absence of a specific constitutional mandate. Wahid's lawyer argued that the decrees had no constitutional validity at all (*ibid.* at 232). Lindsey (2002), on the other hand, argued that as final arbiter of what the 1945 Constitution meant, a role the MPR had at that time, it clearly had the authority to fill the legal void left by the Constitution's Elucidation.

In any case, events proceeded on the assumption that Decree No. III/1978 was the controlling law on the impeachment of a president. On February 1, 2001, the DPR voted (393-4) to issue a memorandum instructing Wahid to appear before the DPR to answer charges that he violated the law due to his alleged involvement in the so-called Bulog-gate and Brunei-gate corruption scandals.⁹⁵ Bulog-gate concerned the alleged embezzlement of about US\$3.5 million from the State Logistics Agency's (Bulog)⁹⁶ pension fund. Sapuan, Bulog's deputy director who was later arrested and imprisoned for his part in the scandal, claimed that Soewondo, President Wahid's personal masseur, had instructed him to get the money for Wahid to spend as humanitarian aid in the politically-troubled province of Aceh (Kingsbury 2005: 201). But the money had actually landed elsewhere. For example, a Rp. 5 billion check drawn against Bulog's pension fund had been cashed by Air Wagon, a start-up airline partially owned by the president. A Rp. 10 billion check had been cashed by Soewondo's wife. And another Rp. 5 billion check had been cashed by Siti Farika, a business-woman closely associated with the president (O'Rourke 2002: 388). One narrative had alleged that, bucking

⁹⁵ Instead of voting, 48 members of the PKB, Wahid's party, walked out in protest.

⁹⁶ *Badan Urusan Logistik Nasional*.

to be promoted as head of the agency, Sapuan had simply bribed Wahid. But Wahid had denied this (*ibid.* at 388-89).

Brunei-gate, on the other hand, involved the personal donation from the Sultan of Brunei of about US\$2 million, intended to benefit the humanitarian NGOs active in war-torn Aceh. But as with Bulog-gate, the money had also landed elsewhere. This time a considerable chunk of the cash had actually gone to the Aceh branch chairman of Wahid's party, the PKB (Mietzner 2001: 42). In both of these cases, the money had been handled informally. Yusuf Kalla who, as Wahid's Trade Minister, was supposedly responsible for Bulog had not been consulted about the withdrawal of the funds. As with Sultan Hasanah Bolkiah's gift, no official accounting or paperwork had been involved. Although there seemed to be plenty of smoke, a probe by the Attorney General's Office concluded in June 2001 that there was not sufficient evidence to prove that a "fire" had actually taken place. But whether or not actual wrong-doing had taken place, the scandals had provided sufficient fodder for Wahid's enemies to mount a formidable political attack against him.

Instead of responding to the charges, Wahid challenged the constitutional validity of the summons. This moved the DPR to issue a second memorandum on April 30, 2001,⁹⁷ this time charging Wahid with violating state policy instead of violating the law through his alleged involvement in corruption. Again, instead of responding to the charges, Wahid challenged the legal validity of the second DPR summons. The result of Wahid's continuing defiance was the DPR's decision on May 30th to vote (365-4 with 42 abstentions) to request the MPR to convene a Special Session to consider impeachment. The final result was all but predetermined when the military refused to back Wahid's plan to declare a state of emergency and call for fresh elections to the DPR. With two abstentions, the MPR voted (599-0) on July 23, 2001, to remove Wahid from office. In addition to being constitutionally dubious, Wahid's impeachment was also procedurally flawed. Assuming that it controlled the impeachment process, MPR Decree No. III/1978 provided that a Special Session could only be convened upon two months' notice. Thus, the earliest that it could be convened to consider Wahid's impeachment was August 1, 2001. But the Special Session had, in fact, been convened on July 21, 2001—ten days earlier than prescribed by law.

⁹⁷ The DPR had voted 363-52 with 42 abstentions to issue the Second memorandum.

Indrayana (2008: 239) argued that Wahid's impeachment spurred the MPR to provide for more specific impeachment procedures in the Constitution. This was obviously true. Strict rules had to be put in place to regulate future impeachment proceedings. But perhaps the more important point to note with respect to the debate on judicial review was that Wahid's impeachment also played a great part, as Hendrianto (2010) argued, in swaying the PDI-P towards favoring an independent MK that was to be established as part of the judicial branch. That the impeachment process had been left entirely to the vagaries of the political process without the benefit of any judicial oversight was probably a point not lost on Megawati and her advisors. How else to explain the turnaround in the PDI-P's position? From the beginning of the debates in PAH III, PDI-P's attitude towards judicial review had been cool at best. When the idea of establishing a constitutional court first surfaced, PDI-P continued to maintain a conservative position and proposed that the constitutional court be established as part of the MA (Harman 2005: 299-300). As a party, PDI-P maintained this conservative position until the August 13, 2000 meeting of Commission A, which had been established specifically to discuss the work that PAH I had accomplished during the period running up to the MPR's 2000 Annual Session (*ibid.* at 305). During this meeting, dissension surfaced within the PDI-P. Although the majority hewed to the position that the constitutional court should be established as part of the MA, a minority argued for the even more conservative position of vesting review powers over statutes in the MPR and not in the judiciary (*ibid.* at 309) while a second, more progressive, minority argued for the establishment of an independent constitutional court within the judiciary (*ibid.* 306-307). Indeed, this split in the PDI-P continued well past the MPR's 2000 Annual Session. PAH I that was established on September 6, 2000, was sharply divided into those that strongly objected to MPR Decree No. III/2000, which had left review powers over statutes in the hands of the Assembly, and those that supported the Decree. As a party, the PDI-P belonged to the second group. Yet, by the 20th meeting of PAH I on July 17, 2001—right around the time of Wahid's impeachment proceedings—the PDI-P had swung, as a party, towards its more progressive minority's position and supported the establishment of a constitutional court as part of judiciary but independent of the MA.

As Wahid's successor, Megawati was also subject to the same *quid pro quo* arrangement. Her maneuverability in the way she wanted to conduct her administration would be equally constrained by this arrangement. Most important of all, she must

have realized that she would be subject to the same political ploy to which Wahid had succumbed. It is not unreasonable to suppose, as Hendrianto (2010) has argued, that Megawati was buying some “insurance” (Ginsburg 2003) against the same political ploy being used against her by maneuvering her party into supporting an independent constitutional court that is beyond the control of the MPR. Megawati had good reasons to distrust the MPR. This was the same Assembly that had torpedoed her chances of assuming the presidency after the 1999 General Elections. Those elections had given her party a plurality of the seats (30.6 percent) in Parliament as well as in the MPR (see Tables 1 and 2 above). Understandably, Megawati felt that the PDI-P’s position gave her a legitimate claim to the presidency. One could argue, however, that Megawati felt a certain kind of entitlement to the presidency as a result of the elections and because of her own personal history as daughter of Soekarno, Indonesia’s first president. As McIntyre (2005: 207-218) pointed out, this feeling of entitlement, probably coupled with political naïveté, predisposed Megawati towards aloofness and non-engagement in the political process when political horse-trading was what was called for. Without engaging in counterfactuals, it is probably sufficient to say that her chances were doomed when, as previously pointed out, Islamist parties, averse to having a female president, formed an informal coalition to support Wahid, whose PKB only managed to garner 10.2 percent of the DPR’s seats in the elections, for the presidency. Joined by Golkar, this so-called Central Axis (*Poros Tengah*) tipped the balance in the MPR and resulted in Wahid obtaining 373 of the votes to Megawati’s 313 (McIntyre 2005: 217).

With this experience probably still fresh in her mind, it is understandable that Megawati was reluctant to leave her political fate as president in the hands of the MPR. By supporting the establishment of an independent constitutional court, she was insuring that any future impeachment proceedings would not be left entirely to the political process but would introduce the participation of a governmental institution that would have less of a direct interest in the outcome. One could argue, therefore, that it was Megawati’s concern with the possibility of impeachment that moved the MPR along towards favoring an independent constitutional court. Moreover, to most rational observers with some realistic expectation of one day assuming the presidency, the battle between the executive and the legislature over the unseating of President Wahid offered the same important lesson. Thus shortly after the PDI-P proposed, in September 2001, the establishment of an independent constitutional court whose powers

would include the supervision of presidential impeachment proceedings, the majority of the factions in the MPR opted to back the PDI-P's resolution in mid-October (Hendrianto 2010).

Although the stalemate over whether to vest review powers in the MPR, the MA or an independent constitutional court had been more or less resolved in favor of establishing a new court, there still remained the question of whether this new court should have the power to review only statutes or also non-statutory laws. Commission A, which had been established on November 4, 2001, with 162 members, failed to reach any consensus on this issue over the six meetings it held from the day of its inception until November 8th. One group within Commission A, consisting of (i) the UG, (ii) the PDU, and (iii) the PDI-P, favored giving the constitutional court jurisdiction over all laws, not just statutes. The other group, consisting of (i) Golkar, (ii) TNI/Polri, and (iii) *Reformasi* (PAN & PK), wanted to limit the constitutional court's jurisdiction to statutes, leaving the MA with the power to review non-statutory laws. Meanwhile, the PKB continued to favor vesting review powers within the MPR. It quickly became obvious that one side was not going to convince the other to change its mind. In a political culture that favored consensus, there was also a question of the PKB. Simply putting the issue to a vote was just not acceptable. In an eleventh hour move to produce results, the factions in Commission A decided, on November 7th, to accept a compromise that the PPP and PBB had proposed on September 27th.⁹⁸ Under the compromise, (i) an independent constitutional court would be established as part of the judicial branch but (ii) its jurisdiction would be limited to statutes, leaving the MA with the power to review non-statutory laws. On November 9th, the MPR ratified the 3rd Amendment to the 1945 Constitution that provided, among others, for the establishment of the Mahkamah Konstitusi (Article 24C ¶¶ (1)-(6)).

Throughout the whole debate over judicial review and the constitutional court, the issue of whether the MK would have a role in protecting human rights was never raised. This was odd since human rights had been debated in the MPR and were incorporated as Articles 28A through 28J in the 2nd Amendment to the 1945 Constitution. As with judicial review and the MK, there was also resistance to incorporating these

⁹⁸ The PPP (*Partai Persatuan Pembangunan*, United Development Party) and the PBB (*Partai Bulan Bintang*, Crescent Star Party) are both Islamist parties. The PPP had initially opposed the idea of a constitutional court but had by this stage favored giving the constitutional court jurisdiction over both statutes and non-statutory laws. The PBB was in favor of restricting the constitutional court's jurisdiction to statutes.

rights into the Constitution (Indrayana 2008: 217).⁹⁹ Because no specific method of protecting these rights, such as a constitutional complaint mechanism for the MK, was ever raised, it is debatable whether these rights were intended as anything more than mere window dressing. Perhaps proponents of the incorporation of these rights into the Constitution were as conflicted as they were about the judicial review and the constitutional court. Although the theoretical notion of limiting government action through judicial oversight was important to many MPR members involved in the debates, they had no real experience with how this notion would work in practice. Used as they were to the informal institutional matrix that guided political behavior during Guided Democracy and the New Order, these politicians were probably more than a little concerned about establishing a new institution that obviously conflicted with the practical realities of politics that continued to persist in Indonesia after *Reformasi*.

Of all the factions involved in the debates over judicial review, only the UG had consistently advocated the idea, initially, of giving the MA broad jurisdiction to review all laws, not just statutes, and later to support the establishment of an independent constitutional court. All other factions, even those that appeared only after the downfall of the New Order, such as the PDI-P, PAN and the PKB—parties led by personalities who had built their reputation, at least in part, as opposition figures to Soeharto's regime—had been less than enthusiastic about establishing an independent constitutional court as part of the judicial branch. PAN (along with the PK in the *Reformasi* Faction) resisted the idea until the November 8, 2001 compromise. Going into the debates held in Commission A between November 4th and 8th, ironically, the PKB—Wahid's political party—continued to insist on vesting review powers in the MPR. PDI-P only supported the idea of an independent constitutional court in the wake of the Wahid impeachment process. Later, PKB and PAN also opposed giving the MK broad powers over statutes and non-statutory laws, insisting that the MA retain its authority to review non-statutory laws. Although the PDI-P as a whole swung around to supporting an independent MK with broad review powers, a minority within the party continued to support the idea of vesting the MPR with review powers over statutes and retaining the MA's jurisdiction over non-statutory laws.

⁹⁹ Ironically, an important issue in these debates concerned the right not to be prosecuted under retrospective laws, the right that Masykur Abdul Kadir invoked in challenging the constitutionality of Law No. 16/2003 in the infamous Bali bombing case discussed above. The champions for this right were Golkar and TNI/Polri whose members were concerned that they could be prosecuted for atrocities committed during the New Order!

The tale did not end with the 3rd Amendment to the 1945 Constitution. To make the constitutional court a reality, the DPR had to pass a bill authorizing its establishment. Although the DPR began to draft the MK bill almost immediately after ratification of the 3rd Amendment, nothing concrete was accomplished for a long time (Stockmann 2007: 9). It was not until May 2003, almost 18 months later, that the DPR actually set up a Special Committee (*Panitia Khusus* or *Pansus*) (ibid. at 9-10). Since deliberations over proposed legislation in the DPR is always done through the *Pansus*,¹⁰⁰ this meant that no formal debate about the MK even took place before May 2003. During the debates over the MK bill, factions who opposed the creation of an independent MK once again tried to limit the Court's jurisdiction. The Government proposed that the MK's jurisdiction be limited to statutes enacted after the 1st Amendment to the 1945 Constitution, viz. to statutes enacted after October 19, 1999. This would effectively mean that statutes enacted during the New Order, many of which formed the basic building blocks of the authoritarian regime, would be beyond the purview of the new constitutional court. Predictably, Golkar and TNI/Polri supported the Government's position. But interestingly other factions, such as the PKB, the PBB, the PDU, the PPP, and the KKI also supported the Government on this issue. Only PDI-P and *Reformasi* rejected the Government's position. The Government won this particular battle and President Megawati Soekarnoputri signed a bill into law (Law No. 24/ 2003) on August 13, 2003, that prohibited the MK from reviewing New Order statutes (Article 50).

The jurisdiction of the new constitutional court would have been restricted to reviewing statutes that were democratically passed after *Reformasi* and prohibited from examining the constitutionality of statutes passed undemocratically under the New Order had it not been for the MK itself. In one of the very first cases brought before the MK, it was asked to review Law No. 14/1985 on the Supreme Court.¹⁰¹ Although the petitioner had not asked the Court to review the constitutionality of Article 50 of the MK Law, the Court took the initiative of doing so instead of dismissing the petition for lack of subject matter jurisdiction. The Court was split 6-3 in deciding that Article 50 of the MK Law was unconstitutional. The majority argued that since Arti-

¹⁰⁰ If the DPR, through the *Badan Legislasi* (the super committee in charge of bills), decides that work on a particular bill can be done through one Commission of the DPR, as opposed to being an undertaking that needed the participation of several Commissions, then the bill may be assigned to a *Panitia Kerja* or *Panja*, a Working Committee.

¹⁰¹ Decision No. 004/PUU-I/2003.

cle 24C of the 1945 Constitution did not limit the MK's jurisdiction to statutes enacted after October 19, 1999, the DPR cannot enact a statute purporting to limit the MK's jurisdiction in this fashion. The majority subsequently reiterated its position in the so-called *Kadin* case.¹⁰² The dissents argued that Article 24C(6) of the 1945 Constitution expressly permitted the DPR to regulate the procedural rules of the MK. To the extent that Article 50 purports to regulate the procedural rules of the MK, it is completely consistent with the Constitution. The majority rejected this argument, saying that it was Article 24C(1), which provided for the MK's jurisdictional competence, that was controlling. They argued that Article 50 did not merely regulate the MK's rules of procedure but also imposed a limitation, not specifically mentioned in Article 24C(1), on the MK's jurisdiction (Butt 2006: 135-144).

IV. Conclusion

The *Mahkamah Konstitusi* is an experiment to remake the institutional matrix that had guided political behavior in Indonesia. During Guided Democracy and the New Order, political behavior was motivated through a system of patron-client relationships, in which access to state resources was exchanged for political support. Power, under this institutional matrix, was maintained through corruption. At the center of this system was a weak and compliant judiciary that was effectively controlled by the government. In addition, the law-making powers of the government went totally unchecked and unchallenged. The MK was meant to change all this. It was supposed to be politically independent and its main purpose was precisely to challenge and check the government's lawmaking powers. As we have seen, however, the process that established the MK was politically flawed. Many of those who benefitted from the institutional matrix of the old system were involved in the process and managed to exert a powerful influence in insuring that the MK was limited in what it could do. Even reformers and opposition figures of the old regime were conflicted in their support for a powerful constitutional court. On the one hand, these people wanted a court that would be able to act as a check on the powers of the government. But the political system in which they worked, even after the downfall of the authoritarian New Order, continued to insist on behavior that was antithetical to the existence of a powerful and independent court that was able to check governmental action. Corrup-

¹⁰² Decision No. 066/PUU-II/2004.

tion continued to be necessary for political survival. In the end, they created a court that fell short of the ideal in terms of its role as protector of Indonesian constitutionalism.

The next chapter deals with the Commercial Court and the Anti-Corruption Court. As that chapter will show, corruption plays a central role in explaining the weaknesses of the two courts.

Chapter 6

Corruption and Bankruptcy: A Tale of Two Courts

After the downfall of the New Order, two courts were established to meet perceived urgent needs of the country. The Commercial Court (*Pengadilan Niaga*) was established in 1998 to hear bankruptcy cases against companies unable to pay their debts as a result of the Asian financial crisis that began in 1997. The Commercial Court began to issue decisions in these cases in late September of that year. Establishment of the Commercial Court was considered a crucial step to implement the necessary corporate restructuring and speedy economic recovery. For similar reasons, the government also established the Anti-Corruption Court (*Pengadilan Tipikor*)¹ in 2004 to help combat the country's systemic corruption, which was widely considered a drag on economic development. The Tipikor, as the Anti-Corruption Court is commonly referred to in Indonesia, began to hear cases in mid-January 2005.² The Commercial Court makes a good contrast to the Tipikor because the former is widely perceived to have failed to exercise its original jurisdiction—bankruptcy law—in a fair and logically consistent manner whereas the latter (with certain reservations, to be sure) is generally considered to have been a success.

Judicial reform seldom, if ever, takes place in an institutional vacuum. This is because institutions, whether formal or informal, are built by individuals not only as a way of solving collective action problems but also, and perhaps more to the point, as a way of consolidating their positions in the political economy (Moe 2005). In other words, they are always built to secure a particular system of power (Robison & Hadiz 2004). The powerful have every incentive to maintain the institutional matrix, whether formal or informal, that best supports their particular system of power (Moe 2005). In Indonesia, the effort to establish two new courts should therefore be seen as a struggle to impose a new formal institution—the rule of law—upon an existing matrix of *competing* informal institutions (Helmke & Levitsky 2004). Hence, it should not be a surprise that the effort would encounter stiff resistance because, as the discussion chapters 3 and 4 has shown, many who were politically powerful during the New Order remained powerful after *Reformasi*.

¹ 'Tipikor' is the acronym for *Tindak Pidana Korupsi* or 'crime of corruption'.

² Many of the arguments relating to the Tipikor were first developed in Tahyar (2010) and those concerning the Commercial Court in Tahyar (1999).

Both the Commercial Court and the Tipikor represented a threat to the existing power structure. Resistance to the Tipikor was as great as the resistance to the Commercial Court. As we shall see, resistance to the Tipikor remains strong today precisely because, unlike the Commercial Court, it has been successful in doing what it was designed to do. But if the Tipikor was as strongly resisted as the Commercial Court, how do we explain the success of the former and the failure of the latter? This chapter argues that the crucial difference between the two courts is the presence of ad hoc judges (essentially full-time non-career judges) who sat on the Tipikor. Although the Commercial Court provided for the possibility of ad hoc judges sitting on its tribunals, their presence was not mandatory and, moreover, the composition of Commercial Court tribunals, in contrast to the Tipikor, insured that career judges would always be in the majority.

After briefly comparing how the two courts have performed in action, the chapter discusses the reasons why the Commercial Court failed and, perhaps more importantly, why it was allowed to fail. The chapter concludes that the Commercial Court represented a grave threat to the country's patron-client politics by reducing the discretionary power the elites had over many aspects of the economy. The chapter then goes on to discuss the important role that corruption plays in the political system as a result of the prevalence of money politics during the post-*Reformasi* period. Like the Commercial Court, the Tipikor also threatened the matrix of informal institutions so indispensable to the system. The chapter shows that the decision to appoint the Supreme Court to spearhead the establishment of the Tipikor actually permitted the new court to be undermined. It was only the active participation of reformers in the process to recruit the ad hoc judges that saved the day by ensuring the presence of highly independent-minded non-career judges on the new court. The chapter then goes on to discuss the uncertain future of the Tipikor due to legislative actions that could undermine the Tipikor's effectiveness or even abolish the court altogether. The chapter concludes by discussing the lessons learned from the establishment of these two courts and concludes that proper financing and careful monitoring of the details of the implementation process are crucially important to success.

I. Failure and Success: Two Courts in Action

The Commercial Court gained notoriety with its decisions in the *Manulife* (2002) and *Prudential* (2004) cases when the bankruptcy law was used to extort pay-

ments in what are essentially contracts disputes.³ In both cases, the respondents in the bankruptcy petitions were financially sound companies. In 2005, the Commercial Court once again used the bankruptcy law to help extort payments from Total in a contracts dispute between Total E&P Indonésie, the Indonesian subsidiary of the giant French oil company, and two Indonesian contractors that had built drilling platforms for Total.⁴ In all three cases, corruption was strongly suspected. But these were not the only cases in which verdicts handed down by the Commercial Court have dismayed both lawyers and lenders. The early cases decided by the Commercial Court in 1998-1999 astonished observers expecting to see impartial and well-reasoned decisions from the new court.⁵

These cases helped seal the Commercial Court's reputation for unreliability, especially with foreign creditors. As a forum for resolving bankruptcy cases, the Commercial Court is "widely perceived as having failed to operate as intended" (IMF 2005: 9). As a practical matter, the number of cases brought before the Commercial Court declined precipitously from a high of 100 in 1999 down to 38 cases in 2003.⁶ But during the same period the incidents of insolvencies and downsizing in the Indonesian economy were steadily increasing.⁷ Thus the comparative statistics clearly showed that fewer litigants were appearing before the Commercial Court because the court was being perceived as unreliable rather than due to any diminution in the number of insolvencies. Although there are defenders of the Commercial Court (e.g., Schroeder-van Waes & Sidharta 2004), the more widely-held opinion is that it has been a failure. To-dung Mulya Lubis, a prominent corporate litigator and human rights advocate, for example, said that he considered the Commercial Court to be "a real failure".⁸ If the proof of the pudding is in the eating, then the fact that creditors—especially foreign creditors—have stayed away should be sufficient testimony as to how the Commercial Court is regarded. Even supporters like Schroeder-van Waes & Sidharta (ibid. at 201)

³ 'Indonesia: No insurance against failure', *Asia Times*, June 28, 2002; 'Who's Bankrupt? Foreign Firm or Jakarta Court?', *Asia Times*, April 30, 2004.

⁴ 'Indonesia's business climate in Total mess', *Asia Times*, February 23, 2005.

⁵ 'Loopholes in the Law: Indonesia's New Bankruptcy Court Fails Test Case', *Far Eastern Economic Review*, October 22, 1998; 'Falling Short: Indonesian Bankruptcy Law is Criticized as Inadequate', *Asian Wall Street Journal*, April 30, 1999.

⁶ Linnan (2010); 'Bankruptcy lawsuits decline by 54% in 2003', *Jakarta Post*, October 17, 2003.

⁷ 'Bankruptcy on the rise', *Jakarta Post*, March 5, 2003.

⁸ Personal Interview.

admit that the Commercial Court's "performance is indeed not reliable, because the outcomes of rulings are highly unpredictable."

By contrast, the Tipikor has been widely considered a success. It started on a positive note by finding Abdullah Puteh, the former provincial governor of Nanggroe Aceh Darussalam, guilty of corruption on April 11, 2005, and sentencing him to 10 years in prison. In addition, the Tipikor fined Puteh Rp. 500 million (about US\$50,000)⁹ and sought restitution for some Rp. 3.6 billion (or about US\$360,000) in alleged losses to the state. Puteh had been found guilty of overcharging the state in the purchase of an official helicopter and pocketing the difference. He was the first defendant to be tried before the Tipikor. Between his conviction and 2007, more than 30 people accused of corruption had been tried before the Tipikor and found guilty. One can quibble about the severity of some of the sentences handed down by the court but, on the whole, the Tipikor has been very positively received in the mass media. There is a widespread perception that justice has been done in the way the court has handled itself.

To date, no corruption suspect brought before the court has escaped conviction. This 100-percent conviction rate has raised eyebrows in certain quarters and led to allegations that perhaps the Tipikor is less than impartial. Mohamad Assegaf and A.W. Adnan, two prominent members of the criminal defense bar, were highly critical of the Tipikor.¹⁰ They argued that the ad hoc judges act more like prosecutors than judges, which has led them to believe that it is impossible for their clients to get a fair trial before the Tipikor. This viewpoint has some credibility because members of the bar not active in defending suspects before the Tipikor, like Frans Winarta, have made similar comments.¹¹ Tipikor supporters have countered, however, that none of the Tipikor's judgments has been reversed on appeal. Indeed, the appellate courts have on occasions seen fit to augment the sentences handed down by the Tipikor. Whatever the merits of the positions of both critics and supporters of the court, the perception popularized in the press and by NGOs involved in governance reform is that the Tipikor has been a

⁹ The value of the Indonesian rupiah fluctuates constantly against the US dollar. In this chapter, Rp. 10,000 is deemed equivalent to one US dollar. All dollar equivalents of the rupiah are therefore approximate.

¹⁰ Interview with Mohamad Assegaf and A.W. Adnan, in Jakarta, November 14, 2007.

¹¹ Interview with Frans Hendra Winarta, founding partner of the law firm of Frans Winarta & Partners and member of the National Law Commission of the Republic of Indonesia, in Jakarta, May 4, 2007.

success if only because it has done what it was designed to do—try people accused of corruption and, if they were found guilty, put them behind bars.

A. *Bankruptcy Law: An Existential Threat*

Why did the Commercial Court fail? To lawyers active in legal and judicial reforms in developing countries, the problem with reforms is commonly perceived as one of ‘reception’ and, eventually, ‘adaptation’ (Nelken & Feest 2001). Legal ‘transplants’ brought from one jurisdiction (usually Western) to another (usually a developing country) need time to become effective and work as they were originally designed to work in the exporting country. The process is therefore ‘gradual’—one that cannot and should not be ‘hurried’ (Neilson 2000).¹² Lindsey & Taylor (2000) took this approach in analyzing the Commercial Court. They argued that the fast-paced approach adopted by the IMF was essentially self-defeating. Clearly, there is a great deal of merit to this line of argument. On a practical level, judges needed time to absorb the complexities of an area of law with which they were unfamiliar. Bankruptcy law is complex and the less-than-three-month period allowed under the reform program was hardly adequate to train Indonesian judges how to apply the new law. Inexperience was therefore blamed for the initial failures of the Commercial Court (Lindsey 1999: 376). This is not an unreasonable explanation. But bear in mind that bankruptcy law is highly procedural (Hoff 1999; Jackson 1996). A closer examination of the early cases shows that many of the issues upon which the controversial Indonesian decisions turned did not relate to bankruptcy procedure but instead concerned fundamental principles of substantive laws such as contracts, corporations, and partnerships. These are areas that form the fundamental building blocks of the typical law school curriculum and should, therefore, have been familiar to the Commercial Court judges.

For example, in the *Dharmala* case,¹³ the Commercial Court misconstrued a case that essentially involved a simple breach of contract. In handing down its judgment, the court failed to distinguish a revolving credit facility from a loan drawn under that facility. Like a credit card agreement, the contract governing a credit facility has

¹² The feasibility of ‘reception’ of transplanted law ranges from unproblematic (Watson 1993) to impossible (Legrand 2001). But most commentators would regard feasibility as lying somewhere on a continuum between Watson and Legrand.

¹³ *PT ING Indonesia Bank et al. v. PT Dharmala Agrifood Tbk.*, Case No. 16/Pailit/1998/PN. Niaga/Jkt. Pst. Note that Dharmala Agrifood was majority owned by Dharmala Inti Utama, the petitioner in the notorious *Manulife* case the Commercial Court decided in 2002.

an expiration date which is different from the date on which a loan drawn under the facility may be due and payable. In rejecting ING Bank's petition, the Commercial Court held that Dharmala's debt to the bank—which the company had failed to repay by the due date stated in the contract drawn under the credit facility—was not yet due and payable because that date did not coincide with the termination date of the facility. Not being in default on its debt, the Court held, Dharmala could not be declared bankrupt. However, this argument is tantamount to saying that a consumer who failed to make his monthly minimum payment was not in default on his credit card debt because the card itself had not expired!

In reaching its decision in the *Ometraco* case,¹⁴ the Commercial Court ignored the basic principles of the law governing corporations. Under corporations law, incorporation of a subsidiary renders it distinct from its parent company. The conscious policy behind the law was to limit the liability of corporations and thereby encourage risk-taking that is inherent in all commercial activity. Thus, a parent company cannot be sued in a jurisdiction just because its wholly-owned subsidiary happens to be incorporated or doing business in that jurisdiction. By the same logic, to sue both parent and its subsidiary, it would be necessary to bring action against both companies. This principle of corporate separateness is fundamental and commonly accepted in most jurisdictions. It is certainly part of Indonesian jurisprudence (Hoff 1999: ch. 3). Yet, in the *Ometraco* case, the Commercial Court threw out a bankruptcy petition because American Express brought two separate petitions against parent company and its subsidiary, arguing that only one petition should have been filed since parent and subsidiary were one economic entity. In doing so, the court ignored a legal principle that would be familiar to most law students.

In the *Hutama Karya* case,¹⁵ the Commercial Court violated a fundamental principle of agency and partnership law. There the court refused to declare two companies—PT Hutama Karya and PT Bina Maint—bankrupt because, in the court's opinion, the petitioners had failed to establish that these companies were responsible for the debts incurred by the Hutama Bina Maint Joint Operation. It was established that the Joint Operation was not separately incorporated from the two defendants. But the similarity of the names of the defendant companies to the name of the Joint Operation,

¹⁴ *American Express Bank Ltd et al. v. PT Ometraco Corp. Tbk.*, Case No. 05/Pailit/1998/PN. Niaga/Jkt. Pst.

¹⁵ *PT. Jaya Readymix et al. v. PT Hutama Karya et al.*, Case No. 24/Pailit/1998/PN. Niaga/Jkt. Pst.

and the fact that the two defendants had offered a settlement—unsatisfactory to the creditors—are prima facie sufficient to establish that PT Hutama Karya and PT Bina Maint are in fact partners in the Joint Operation (Hoff 1999: ch. 3). Article 18 of the Indonesian Commercial Code imposes joint and several liability upon the two partners for the actions of the partnership. Thus, although a contract may not have been signed between the creditors and the two companies, they were nevertheless responsible for the debts of the Joint Operation.

No doubt, some of the cases brought before the Commercial Court were factually complex, involving multiple parties and thick documents written in English rather than Indonesian because of lenders' preference for loan agreements to be governed by New York or English law. This would have made things difficult for the Indonesian judges, most of whom had not had much experience with highly complex commercial cases because business disputes in Indonesia tended to be mediated out of court. But Indonesian judges should have been familiar with the basic concepts of the substantive laws involved no matter how inexperienced they might have been with the new bankruptcy procedures. That these judges made such fundamental mistakes with the basic principles of the substantive laws strongly suggests that corruption and/or political manipulation was involved. A statistical analysis of Commercial Court cases conducted by Suyudi (2004) showed that debtors represented by a lawyer whose initials were HPH consistently succeeded in having bankruptcy petition brought against them thrown out although a number of these cases proved to be quite controversial. The common thread among the debtors represented by HPH was that they were all large companies with overdue debts in excess of US\$1 million (*ibid.*). These early suspicions of corrupt behavior on the part of Commercial Court judges were later confirmed by cases like *Manulife*, *Prudential*, and *Total*.

Observers blamed the failure of the Commercial Court to function as a reliable forum for insolvency cases on its creators' inability to insulate the new court from the country's judicial system. In particular, the decision to recruit judges for the Commercial Court from the career judiciary was considered "a key factor" that led to its downfall (IMF 2005: 9). There were attempts by reformers like Mardjono Reksodiputro to mitigate against the wholesale integration of the Commercial Court into the general judicial system. These reformers wanted to use the Commercial Court as a 'model' court for reforming the entire Indonesian judicial system. As chairman of the committee set up to establish the Commercial Court, Mardjono wanted to recruit judges for

this court by advertising the positions and receiving applications from qualified judges throughout Indonesia.¹⁶ Despite the judiciary's reputation for corruption, honest judges do exist. It was the reformers' hope to recruit these honest judges for the Commercial Court or at least to exercise some influence in the process of determining which judges would sit on their 'model' court. This reform initiative was vigorously opposed by Din Muhammad, the late Supreme Court justice responsible for research and development, who served as vice chairman of the committee.¹⁷ Muhammad argued that there were rules that governed the career development of judges, and these rules may well prevent judges then serving in courts outside of the capital from taking up posts in Jakarta if they were deemed suitable under the recruitment plan Mardjono proposed. Instead, Muhammad handpicked 30 judges who, because of their career development, were eligible to serve in Jakarta if they were eventually chosen to serve in the Commercial Court. No attempt was made to vet these judges for their integrity or competence.¹⁸

Reformers also pushed for the inclusion of ad hoc judges in the judicial panels appointed to try cases in the Commercial Court. Their role in the Commercial Court was to act as experts, and they were to be recruited from among practitioners and academics well versed in the laws governing complex financial matters (IMF 2005: 11). Their presence in the Commercial Court was also supposed to help decrease incidents of corruption because the ad hoc judges were supposed to be chosen from among lawyers with impeccable reputation for integrity (*ibid.*). But the introduction of ad hoc judges to the Commercial Court was initially resisted by the judiciary and, in particular, by the chief justice of the Supreme Court, Sarwata, a holdover from the New Order who had been appointed by President Soeharto.¹⁹ The judiciary rejected the introduction of ad hoc judges for the Commercial Court even though the notion of ad hoc judg-

¹⁶ Interview with Mardjono Reksodiputro, Secretary of the National Law Commission of the Republic of Indonesia, founding partner of the law firm of Ali Budiardjo Nugroho Reksodiputro and Professor Emeritus of Law, University of Indonesia (Jakarta), in Jakarta on May 3, May 11, and June 6, 2005 and October 25, 2007.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Interview with Gregory Churchill, a Harvard-trained American lawyer who has spent most of his career practicing law in Indonesia, in Jakarta, April 12, 2005. Prior to his retirement, he was Of Counsel to the ABNR law firm in Jakarta. Mr. Churchill was actively involved in the bankruptcy law reform process in 1998.

es serving on judicial panels had already been accepted with respect to the country's administrative courts established during the New Order.²⁰

The Supreme Court eventually relented and agreed to a compromise in which four ad hoc judges were appointed—two retired judges and two law professors.²¹ But the reformers had no say on the recruitment of the ad hoc judges; instead, they were handpicked by the Supreme Court.²² According to Mardjono Reksodiputro, the two academics appointed had little practical knowledge of how commercial laws were applied in the real world. Moreover, there was no requirement that each panel had to include an ad hoc judge. The rule was that the litigating parties, with the consent of the chief judge of the Central Jakarta District Court, could choose an ad hoc judge from a prescribed list to sit on a panel trying their case. It is interesting to note that not many litigants chose this option. Only one ad hoc judge was ever invited to sit on a panel, and she was only asked to sit on one nearly two years after the establishment of the Commercial Court. Her experience was short-lived; she heard only nine to ten cases in total (IMF 2005: 11). Moreover, no ad hoc judge has been seated on a Commercial Court panel since 2002 (*ibid.*). It is possible that ad hoc judges never made much of a splash on the Commercial Court because two of the three judges serving on a Commercial Court panel had to be appointed from the career judiciary, making it pointless to appoint an ad hoc judge who would always be in the minority. It might also be the case that many debtors hauled before the court actually preferred to be heard by a panel of judges whose decisions could be more easily bought.

Other attempts by reformers to insulate the Commercial Court from the rest of the judicial system also failed. The Commercial Court had to be established as a 'chamber' of the Central Jakarta District Court rather than as an independent entity because under Law No. 14/1970 governing the judiciary (still extant in 1998) only four types of courts were authorized.²³ Knowing that it was unrealistic to expect *de jure* independence for the Commercial Court, reformers worked hard to secure *de facto* independence for the new court. For example, they wanted a deputy chief judge of the Central Jakarta District Court to be especially appointed to take charge of the new

²⁰ Although the notion of an ad hoc judge was accepted in principle, no ad hoc judge was ever appointed to a panel on the administrative courts (Interview with Mardjono Reksodiputro).

²¹ Interview with Gregory Churchill.

²² Interview with Mardjono Reksodiputro.

²³ These were (1) the courts of general jurisdiction, (2) the military courts, (3) the religious courts, and (4) the administrative courts.

court rather than have it be the under the direct authority of the district court's chief judge. The chief judge of a district court traditionally has a great deal of discretion in deciding which judges would hear what cases. Unscrupulous lawyers have typically exploited this discretionary power by bribing him/her to insure that judges known for their moral laxity are appointed to hear their client's cases. Reformers also wanted the Commercial Court to have its own registrar so that the registrar of the district court would not take part in the administration and case management of the new court. These reform initiatives failed because of resistance from the leadership of the Central Jakarta District Court to the creation of a *de facto* independent Commercial Court. Neither the chief judge nor the registrar wanted to share their monopoly on power within the District Court. Moreover, career judges were also reluctant to serve in a Commercial Court insulated from the district court. The goal of career judges is to be appointed someday to the Supreme Court. To achieve that goal, they must follow a predetermined career path. Being stuck in the Commercial Court or any other specialized court would mean an end to their career ambitions.²⁴

A functioning bankruptcy system was considered crucial for Indonesia to recover from the financial crisis that besieged the country in 1997-98. It was widely believed that lenders were less likely to extend credit to Indonesian companies if they believed that it would be difficult to get their money back from defaulting borrowers. Confidence in Indonesia's bankruptcy system was therefore regarded by many as key to getting foreign banks and investors to begin putting their much-needed money into the country again. Given the importance of bankruptcy law to economic recovery, why was the Commercial Court allowed to fail? Why didn't the government—if not Soeharto's, then at least Habibie's—do everything in its power to ensure that honest judges were appointed to the Commercial Court? Why did it make so little effort to insulate the Commercial Court from the predations of the general judicial system as reformers like Mardjono Reksodiputro had wanted to do?

The Commercial Court was allowed to fail because, carried to its logical conclusion, an efficient bankruptcy regime threatened to introduce free-market capitalism to Indonesia and thereby subvert the politics of patrimonialism—the informal institutional matrix that was an indispensable pillar of the New Order's political-economic power structure. An essential element of patron-client politics is the ability of patrons

²⁴ Interview with Mardjono Reksodiputro.

to determine who gains access to publicly-owned economic resources; in effect, to determine economic winners and losers. Those fortunate enough to become clients are then expected to become loyal political supporters of their patrons. Crony businessmen like Mohamad 'Bob' Hassan, who made a fortune from the timber concessions Soeharto gave him, gave the New Order their full political support. This public-private quid pro quo was widespread during the New Order and the businesses spawned from these arrangements constituted a significant portion of the country's domestic private capital, which contributed between 50 and 70 percent to Indonesia's GDP (Hill 1990). Not surprisingly, free-market capitalism was antithetical to this system of 'political capitalism'. There were several ways that an efficient bankruptcy regime threatened Indonesia's patronage machine.

First, business reorganization through bankruptcy might have broadened public ownership of economic assets; that is, it might have broken up monopolies and transferred assets from cronies to more politically independent hands. Granting monopolies to cronies was an important way through which the regime retained their loyalty and cooperation. Soeharto showered his cronies with such business opportunities. This explained the high levels of industrial concentration that characterized the Indonesian economy. As much as 35 percent of GDP was accounted for by the sales of Indonesia's top 200 conglomerates in 1991. In 1993, B.J. Habibie, then Soeharto's Minister for Research and Technology, estimated that Indonesia's top 10 conglomerates controlled nearly a third of the country's economy (Schwarz 1994: 122). Hence huge chunks were effectively controlled by businessmen to whom the regime owed an obligation of protection and favors in return for loyalty and support. For example, protection and favors insured Liem Sioe Liong a 75-percent share of the Indonesian market for his instant noodle business. Patronage also gave his Salim Group a third of the domestic milk market, more than a 50-percent share of the snack food market, and a fifth of the market for baby foods.

In return for these favors, the Salim Group agreed to invest in projects deemed important by the regime. The US\$100 million the Group invested into Cold Rolling Mill Indonesia to produce steel plates and sheets was an example of business-government cooperation under the New Order. Antitrust reforms, which would have also resulted in the dispersion of ownership, were similarly resisted by the regime. Ultimately, an efficient bankruptcy regime would have harmed the business interests of the regime's strongest supporters. More importantly, it could have put economic

assets into the hands of companies less willing to do the government's bidding. Perhaps this was the reason why debtor companies controlled by conglomerates like Ometraco and Dharmala, discussed above, prevailed in the Commercial Court. Dharmala was declared bankrupt only after obviously erroneous judicial decisions proved politically too embarrassing for the government and, perhaps, ultimately too damaging to its relationship with the World Bank since one of the plaintiffs in the suit against Dharmala was the IFC, the Bank's subsidiary that lends to the private sector.

Second, business reorganization through bankruptcy could have resulted in the privatization of state-owned companies. Despite the best efforts of the country's technocrats to privatize inefficient state-owned economic assets in 1989, the scheme never got beyond the planning stage (Schwarz 1994: 60-62). Economic nationalists—who favored economic interventionism and state-control over key areas of the economy—like B.J. Habibie and Ginandjar Kartasasmita, fought a successful rearguard action against the planned privatization. Given the prominence of these individuals in the Indonesian government during the immediate post-*Reformasi* period, it is possible that the weakness of the country's bankruptcy regime could have been attributed to economic nationalism.

More importantly, however, the regime's patronage machine—for which economic nationalism may simply be the other side of the coin²⁵—was also threatened by privatization. State-owned enterprises like Pertamina, the oil company, were major sources of patronage funds. Despite its complete mismanagement under General Ibnu Sutowo, the company was allowed to operate unhindered until its uncontrolled borrowing, amounting to about US\$860 million in three years, eventually triggered a debt crisis and brought about Pertamina's near-collapse. As a former minister of mines pointed out, Pertamina was never required to account for its activities because "Ibnu Sutowo provided pocket money for all the top military leaders" (Winters 1996: 83 n. 107). Winters noted that Soeharto eventually withdrew his support for Sutowo only when the windfall from the worldwide oil price-hike rendered unnecessary the patronage resources Sutowo made available (ibid. at 90-91).

The regime's control over state-owned enterprises permitted lucrative contracts to be given to cronies or otherwise dispensed to win over the regime's critics. Funds

²⁵ Commentators have often differentiated economic nationalists from the patrimonialists (e.g., Linnan 2000); but Ibnu Sutowo, a prominent economic nationalist and mentor to B.J. Habibie, also played an important part in the regime's patronage machine. Ultimately, it was difficult to tell where ideology ended and political imperatives began.

from state-owned banks could also be dispensed in similar ways for the same patronage purposes. “Privatisation would mean, in effect, that Soeharto would relinquish one of his most important tools for maintaining his hold on power” (Schwarz 1994: 61). The new bankruptcy law, if applied efficiently, would have made possible the ‘judicial’ privatization of state-owned assets that the regime had taken great pains to avoid politically. The legal bankruptcy of state-owned companies like PT Hutama Karya, discussed above, would therefore have created a dangerous precedent. This might explain the Commercial Court’s decision to deny the creditors’ petition in that case. Due to the Habibie government’s weak bargaining position, it accepted the necessity of privatization in principle, but it was not at all certain that privatization was being carried out either quickly or efficiently under his brief watch.

Third, and most importantly, accepting an efficient bankruptcy system would have forced the regime to place greater reliance on the free market to determine the country’s economic winners and losers. The fate of economic liberalization waxed and waned in New Order Indonesia along with its most ardent champions—the technocrats. Typically, the technocrats fared well whenever foreign funds, both from private investors and public sources such as international financial institutions (IFIs) like the World Bank and foreign governments, had been urgently needed to sustain economic development (Winters 1996). Thus, the technocrats reached the apex of their influence during the early years of the New Order, when economic conditions had reached rock bottom as a result of the policies of Soekarno’s Guided Democracy, and during the latter half of the 1980s when, as a result of the plunge in oil prices, foreign money once again became important for economic development.

In contrast, the technocrats were largely ignored during the intervening oil-boom years, 1974 through 1982 (*ibid.*). Windfall profits from the oil boom kept the economy buoyant despite the minimal presence of foreign funds. There was plenty of money about to keep the patronage machine well oiled. Following the drop in world oil prices, however, the technocrats regained the ascendancy and, by 1988, had assured the passage of far-reaching economic liberalization measures. Victim to this process, for example, was Panca Holdings’s monopoly on the import of plastics, which Schwarz (1994: 50) called “[o]ne of the most glaring examples of government-sponsored cronyism.” Its fall was totally unforeseen because its main beneficiaries were two of Soeharto’s sons and his cousin. As discussed below, however, this liberalization also paved the way for ‘politico-bureaucratic’ families to become ‘politico-busi-

ness' families when it enabled cronies to buy assets from the government (Robison & Hadiz 2004).

As has been previously pointed out, the regime's ability to carry out economic reforms convinced Hutchcroft (1998) that the patrimonialism that existed in Indonesia was far less resistant to changes than the patrimonialism that dominated political life in the Philippines. But these types of examples were misleading. Indonesian patrimonialism was every bit as resistant to changes as the Filipino variety, if such changes threatened to alter "the terms by which the elites govern" (Lev 1978: 40). One must not overlook the fact that the technocrats' influence had once again begun to wane by 1993 when, in a cabinet reshuffle, three leading technocrats were abruptly dismissed, dimming the prospects for further reform considerably (Schwarz 1994: 51). The important point to note is that although economic liberalization was implemented as a result of external pressures, the decision to commit to the process—as well as any determination to tone down such liberalization—remained strictly within the regime's political discretion. On the other hand, commitment to an efficient bankruptcy system—with all the commitment to the rule of law that it implied—would have taken that decision out of the hands of the executive and rendered it a matter purely for judicial determination. As discussed in chapter 2, an independent judiciary was something that the New Order had always resisted.

B. Corruption: An Essential Informal Institution

Because the granting of particularistic access to public resources is central to any clientilistic arrangement (Roniger 2004), corruption—or rent-seeking—necessarily plays an integral role in the system. Corruption was therefore a key element in the 'political capitalism' that was the essential feature of Indonesia's political economy under the New Order, where firms succeeded not because they were more efficient than their competitors but because they received preferential treatment from the government. Corruption, therefore, was not simply deeply ingrained culturally in Indonesia; in fact, as an integral part of clientelism, it was an important informal institution in the country's political economy. To a significant extent, as discussed in chapter 3, this system of patron-client politics—with the extensive corruption that it entailed—survived the New Order's downfall and remains prevalent today. Post-*Reformasi*, this informal institution has been adapted to fit a democratic context. Votes are exchanged for money. Government jobs—especially important positions in the bureaucracy—are

sold to those who can afford them. Even legislation favorable to certain particularistic interests can be bought. This system of patron-client politics with its inherent corruption—now typically referred to as ‘money politics’—remains deeply embedded in Indonesia. It cannot be regarded simply as a governance problem (Goodpaster 2002) or the results of authoritarian rule (Dick 2002).

Under the New Order’s patrimonialistic politics, KKN (*Korupsi, Kolusi dan Nepotisme*)²⁶ lay at the heart of power relations. But had these arrangements stopped there, perhaps institutionalization of the political rules of the New Order would have remained weak. These arrangements went much deeper, however; the politico-bureaucrats who controlled gate-keeping institutions—like Ibnu Sutowo and Soeharto himself—as well as their respective families actually entered the business world as capitalists, instead of simply remaining rent-collecting bureaucrats. From ‘politico-bureaucratic’ families, they had turned into ‘politico-business’ families (Robison & Hadiz 2004).²⁷ Because their beginnings as capitalists depended so much on sweetheart deals from the government, the type of capitalism that evolved in Indonesia is, as a result, qualitatively different from what we would recognize today as ‘rule-based free-market’ capitalism. That this political economic order survived the downfall of the New Order and the demand for *Reformasi* is perhaps most vividly illustrated by the inability of the current and two preceding governments to bring Soeharto to justice. To be sure, immense political changes have come to Indonesia since 1998 and many of the prominent characters of the New Order have quietly gone by the wayside, but others have survived and, as Robison & Hadiz (2004) argued, have ‘reorganized’ themselves into the country’s new democratic politics. For example, Golkar, the vehicle through which Soeharto wielded power, is still the dominant political party in the Indonesian parliament, the *Dewan Perwakilan Rakyat* (DPR). Golkar personalities have also infiltrated other parties in the DPR. Some have jumped over to join the PDI-P,²⁸ the other dominant political party in the DPR. Thus, in democratic Indonesia, many of the elements of the old regime are still politically active and remain powerful.

How did this form of political capitalism survive the downfall of the New Order? Crises are supposed to be an opportune time to impose reforms upon a weakened regime. Why weren’t IFIs like the IMF and the World Bank able to do more to impose

²⁶ Indonesian for ‘Corruption, Collusion and Nepotism’.

²⁷ The discussion here draws fairly heavily upon the analysis made by Robison & Hadiz (2004).

²⁸ *Partai Demokrasi Indonesia-Perjuangan*, or the Indonesian Democratic Party of Struggle.

neo-liberal reforms on the Indonesian government in the aftermath of the Asian financial crisis?²⁹ The hope had been that foreign companies would buy the assets of financially-distressed cronies and, that they would manage these assets according to the principles of good corporate governance. Were this to take place, policy-makers within the IFIs reasoned, then a demand for a rule-based free-market political economy might begin to materialize in Indonesia. But this hope was frustrated by the unwillingness of foreigners to buy Indonesian assets and the resistance of economic nationalists who wanted to see Indonesian assets remain in Indonesian hands (Robison & Hadiz 2004: 197-99).

Cronies and politico-business families were also to benefit from another government handout that helped save their conglomerate empires—the Bank Indonesia Liquidity Support (*Bantuan Liquiditas Bank Indonesia* or, simply, BLBI). The BLBI was ostensibly a facility to help ailing Indonesian banks meet their financial commitments to other banks as well as to their own depositors. But many Indonesian banks were owned and controlled by conglomerates that included manufacturing and trading companies. Instead of using the money as intended, recipients of BLBI credits used the facility to pay off their conglomerates' corporate debts and to invest within their groups in Indonesia as well as abroad. As a sign of the continued vitality of their political influence, the politico-business families and conglomerates were to make it extremely difficult for the Indonesian government to recover these handouts. As security for the BLBI credits, the conglomerates were required to pledge their assets to IBRA (Indonesian Bank Restructuring Agency). But conglomerates were often allowed to hand over complicated portfolios consisting of bits of assets that made verification of their true value exceedingly difficult. For example, the Salim Group—once headed by Liem Sioe Liong, whom Schwarz (2004: 109) called “the most visible beneficiary of Suharto's patronage”—was allowed to “hand over a complex package of assets from 105 companies [that] made due diligence appraisals a nightmare” when pledging just three companies—Indofood, Bogasari and Indasair—would have been more than adequate to cover all of the group's debts (Robison & Hadiz 2004:194). As it turned out, the assets pledged by the Salim Group to cover a debt of Rp. 47.7 trillion—said to be worth Rp. 53 trillion—were later valued at merely Rp. 24 trillion (ibid. at 194-95). The BLBI scandal continues to bedevil successive Indonesian governments, with many

²⁹ See p. 70, *supra*, for further details of the reform program.

promises of action being made but no clear resolve being shown to bring those involved to justice.

The BLBI scandal illustrated the impotence of the Indonesian government to root out political capitalism. Many of the conglomerates involved were controlled by the Chinese business families. After the Asian financial crisis, Chinese businesses were the only ones that could be relied upon to return to Indonesia. Foreign businesses were not interested in coming to Indonesia because of the rampant corruption and the lack legal certainty. But the Chinese business families were reluctant to come back if they were going to be prosecuted for corruption. For this reason, Robison & Hadiz (2004: 213) suggest, corruption could not be prosecuted with vigor. In addition, the Chinese businesses thrive in an environment where there was a clientilistic relationship between officialdom and business. While his new attorney general is preparing to bring BLBI suspects to justice, President Yudhoyono himself pleaded just a year ago for these very same persons to come back to Indonesia to invest their money in the country.³⁰ To what extent could the Indonesian government effectively prosecute the very people the country needed to regenerate its flagging economy?

Ironically, in certain cases, foreign interests also protested against the confiscation of cronies' assets. For example, foreign partners of producers of electricity complained vigorously and brought action in foreign courts to stop PLN—the state-owned electricity company—reneging on contracts that were disadvantageous to the state and that were clearly entered into without the benefit of a public tender conducted in a transparent manner. Foreign governments backed up these companies' complaints because, very often, foreign taxpayers' money was used to finance the foreign partners' investments through such entities as the Exim Bank in the United States. Thus foreign pressure often prevented the confiscation of cronies' assets (Robison & Hadiz 2004: 202).

For the reasons discussed above, it may be argued that if Indonesia's political economy—forged during the New Order—did not survive the downfall of the regime totally intact, then it survived substantially so. Some of the more high-profile cronies have disappeared but others have remained. For example, the Liem family still controls Indofood and Bogasari, while Prajogo Pangestu, another crony, is still at the helm of his Barito Pacific group. The Bakrie group is another conglomerate that survived

³⁰ 'SBY urges troubled tycoons to return home', *Jakarta Post*, April 19, 2006.

the Asian financial crisis intact. It is controlled by the family of Aburizal Bakrie, the current chairman of Golkar and former coordinating minister for the people's welfare in Yudhoyono's first term. The group is currently involved in a couple of high-profile controversies. The first of these involved the Sidoarjo mudflow—an ecological disaster—by way of Lapindo Brantas, a natural-gas drilling company controlled by the Bakrie group. A mishap at a drilling site in Sidoarjo, East Java, caused hot mud to flow and submerge the surrounding locality. The homes and businesses of about 15,000 people in Sidoarjo were destroyed, resulting in damages that were calculated by Bappenas to be in the region of Rp. 27.4 trillion (or over US\$3 billion).³¹ But responsibility for the disaster, including compensation for the victims, seems to have been shifted away from the Bakrie group to the public. By Presidential Regulation No. 14/2007, the government has agreed to bear most of the cost, leaving Lapindo Brantas responsible for only a small percentage of the damages. The case clearly presented a conflict of interests for Aburizal Bakrie, the senior minister ostensibly responsible for the welfare of the 15,000 victims of the mudflow, whose group of companies has clearly benefitted from the government rescue.

Despite this conflict of interests, Aburizal Bakrie's position in President Yudhoyono's cabinet remained fairly secure for some time.³² Indeed, some would argue that the Bakrie group has recently received another government largesse. The group won the rights to build a 35-kilometer-long toll road in Central Java, from Cirebon to Brebes, and received loans from two state-owned banks. Economist Faisal Basri has questioned why the Bakrie group, which has no experience in toll-road construction, should have been awarded the contract. In addition, it appeared that one of the state-owned banks financing the project—Bank Rakyat Indonesia, which normally lends exclusively to small- and medium-sized enterprises as well as to farmers—has no experience in infrastructure projects and therefore would not have the expertise to judge, at arm's length, the financial viability of such projects.³³ With such powerful figures benefiting from dubious government largesse, it was clearly difficult to prosecute a thorough-going anti-corruption campaign.

³¹ 'Fresh Wind For Bakrie', *Tempo Magazine*, April 23, 2007.

³² On June 29, 2007, the *Jakarta Post* commented: "The fact that Yudhoyono has kept Aburizal in the Cabinet, despite the blatant conflict of interest, even protecting him by not exposing him to the handling of mud-flow problems, has led many to believe that Yudhoyono cannot afford to lose the support of this former businessman. There is much suspicion that Yudhoyono badly needs Aburizal's financial support for his re-election bid in 2009."

³³ 'Precious Gifts for Bakrie', *Tempo Magazine*, March 26, 2007.

The increasing prevalence of money politics in Indonesia has also made it very difficult for any government to pursue an active campaign against KKN. Of course, money politics had always been a feature of the New Order. But with the demise of authoritarian rule, money politics has taken on even greater importance in Indonesia. During the 1999 general elections, Golkar was alleged to have ‘bought’ votes in a number of ways (Irwan 2002: 92-95). For example, a Golkar advisor who was an important local political figure in South Sulawesi was reported to have traveled throughout his region giving away money to important constituents, such as village chiefs (ibid. at 92-93). In Wonogiri Regency, Central Java, a Golkar functionary was caught trying to distribute money to each resident in the regency in a direct attempt at vote-buying (ibid. at 94-95). The money for these attempts to buy or influence votes does not only come from party coffers. The money comes from wealthy individuals, corporations—often in violation of laws limiting campaign contributions—and, as the recent *Rokhmin Dahuri* case³⁴ before the Tipikor showed, from off-budget accounts in government ministries. Revelations in the case recently embroiled President Yudhoyono in the scandal when Dahuri testified that he had given the Yudhoyono/Kalla 2004 presidential campaign Rp. 200 million (about US\$22,000). Another prominent politician, Amien Rais of PAN (National Mandate Party), publicly admitted receiving a similar amount from Dahuri through his presidential campaign organization. The list of contributions was long and touched practically every serious presidential contender in 2004.³⁵

If politicians have ‘bought’ votes in order to get elected to the DPR, it should not be surprising that they have also ‘sold’ legislation. The recent corruption scandal involving Bank Indonesia (BI), the country’s central bank is illustrative. On January 7, 2009, the Tipikor sentenced two legislators, Anthony Zeidra Abidin and Hamka Yandhu, two members of the Golkar party, to 4½ and three years in prison, respectively, for illegally accepting ‘gratuities’. The scandal dates back to mid-2003 when the two men were members of the DPR’s Finance & Banking Commission, then called Commission IX. But the case goes back further to 1998 when Soeharto

³⁴ Rokhmin Dahuri was Minister of Fisheries & Maritime Affairs under the administration of President Megawati Soekarnoputri and her predecessor, Abdurrahman Wahid. Dahuri allegedly instructed senior aides in his government department to collect money from funds intended for local projects. He subsequently used these funds for political as well as personal purposes. He was convicted and sentenced to seven years imprisonment (‘Rokhmin gets seven-year jail term’, *Jakarta Post*, July 24, 2007).

³⁵ ‘Build case on Amien admission’, *Jakarta Post*, May 19, 2007.

instructed BI to release funds to distressed banks to help them with their liquidity problems, which eventually led to the BLBI scandal discussed above. Even today, a substantial portion of the BLBI money has not been repaid by the beneficiaries of the plan. They remain on the government's books as 'non-performing loans.' But whose books exactly? If those NPLs were attributed to BI, then it would affect the central bank's credit ratings, and BI would find it very difficult to issue bonds or borrow money from foreign banks. BI wanted the Ministry of Finance to assume official responsibility for paying back the lenders that had financed the ill-fated rescue package. The Finance Ministry would only agree to do so if the DPR gave the arrangement its approval.³⁶ The DPR, however, was in no hurry to make that determination. The Supreme Audit Agency (BPK)³⁷ first raised the issue of which government department would be responsible for repaying the lenders that financed BLBI plan in May 1999, but it was not until July 2003 that the DPR finally voted to shift responsibility for the loans to the Finance Ministry.³⁸

One can appreciate BI's impatience at the DPR's dithering. Moreover, BI was also concerned about another issue that was scheduled to be decided by the DPR. Law No. 23/ 1999, BI's governing statute, had given BI the authority to supervise banks (Articles 8c and 24-35). The statute added considerably to BI's bureaucratic turf since its responsibility for bank supervision used to be very limited during Guided Democracy and Soeharto's New Order. Unfortunately, Article 34 of Law No. 23/1999, adopted on the strong recommendation of the IMF, provided for the transfer of this power to an independent agency by December 31, 2002. Having just been given this supervisory power, BI was loath to give it up again so quickly (Sato 2005: 111). BI strenuously lobbied the DPR to delay the transfer of this power. Members of the DPR's Commission IX responded by coyly hinting to BI officials that "[e]xpenses have to be provided for this"³⁹ or "[t]his project could cost you".⁴⁰

Bribing legislators to get laws passed having been an established "tradition" since the 1970s, senior BI officials had no compunction about lending these DPR members "a helping hand".⁴¹ On June 3, 2003, and again over a month later on July

³⁶ 'Manna Falling in Senayan', *Tempo Magazine*, July 8, 2008.

³⁷ *Badan Pemeriksa Keuangan*.

³⁸ 'We Only Love You for Your Money', *Tempo Magazine*, July 8, 2008.

³⁹ 'Manna Falling in Senayan', *Tempo Magazine*, July 8, 2008.

⁴⁰ 'Bankrolling the House', *Tempo Magazine*, July 8, 2008.

⁴¹ *Ibid.*

22, Burhanuddin Abdullah, BI's governor, convened two meetings with his deputies to decide how and how much money BI was going to come up with to bribe the members of Commission IX. They decided to raid the YPPI,⁴² the Indonesian Banking Development Foundation, which BI founded "to help the central bank and other banks develop their human resources".⁴³ A total of Rp. 31.5 billion (about US\$3.15 million) of YPPI's money was stolen to finance the bribery scandal. Between June 27th and December 8th of that year, Rusli Simandjuntak, the person in charge of the BI Governor's office, made a series of payments to Hamka Yandhu and Anthony Zeidra Abidin, mostly at the latter's home.⁴⁴ The funds were eventually distributed to the members of Commission IX including, allegedly, Paskah Suzetta, President Yudhoyono's Minister for National Development Planning (2005-2009), and Malam Sambat Ka'ban, his Minister of Forestry (2004-2009).⁴⁵

The bribes bought some positive results for BI. In addition to a favorable resolution of the BLBI issue, BI also got a delay on the transfer of its supervisory powers over banks. Law No. 3/2004, approved by the DPR on December 19, 2003, but only signed into law by President Megawati Soekarnoputri on January 15, 2004, amending Law No. 23/1999, delayed the transfer until December 31, 2010. Unfortunately, the scandal did not end so happily for many of the parties involved. In addition to Yandhu and Abidin, a number of BI officials, including Burhanuddin Abdullah, were tried and convicted by the Tipikor. To President Yudhoyono's credit, he did not interfere in the prosecution of Aulia Pohan, one of Abdullah's deputies, who is his son's father-in-law. In June 2009, the Tipikor found Pohan guilty and sentenced him to 4½ years in prison.⁴⁶ But his sentence was subsequently reduced by a year, and he was released on parole barely more than one year after he started serving his sentence.⁴⁷ Despite Yandhu's testimony before the Tipikor that he had personally given the money to both former Forestry Minister Ka'ban and former Development Planning Minister Suzetta, neither man has been prosecuted so far.⁴⁸ However, Suzetta was recently arrested and

⁴² *Yayasan Pengembangan Perbankan Indonesia*.

⁴³ 'YPPI accountable in BI corruption case', *Jakarta Post*, September 18, 2008.

⁴⁴ 'We Only Love You for Your Money', *Tempo Magazine*, July 8, 2008.

⁴⁵ 'BI graft suspect demands former colleagues be charged', *Jakarta Post*, September 10, 2008.

⁴⁶ 'Indonesia Court Jails President's In-Law For Graft', *Reuters*, June 17, 2009.

⁴⁷ 'Aulia Pohan, Ex-BI Execs Released on Parole', *Jakarta Globe*, August 20, 2010

⁴⁸ 'Paskah said to help cover-up BI scandal', *Jakarta Post*, July 7, 2008.

detained by the KPK related to BI's Miranda Goeltom scandal, which is discussed in the remaining part of this section.

The members of Commission IX have also allegedly sold important positions in the bureaucracy. During his trial, Hamka Yandhu named a PDI-P legislator, Agus Condro Prayitno, as one of the members of Commission IX to whom he had given some of the money he received from BI's Rusli Simandjuntak. Fearing that his goose had already been cooked, Prayitno went to the KPK,⁴⁹ the Corruption Eradication Commission, to confess his guilt in yet another BI scandal. This time it involved the appointment of Miranda Swaray Goeltom as senior deputy governor—in effect, the number two position at BI—on June 26, 2004. Article 41 of BI's 1999 governing law, as amended by Law No. 3/2004, authorized the president to nominate and appoint members of BI's Board of Governors with the consent of the DPR. In a process that has come to be known as the “fit-and-proper” test, the DPR has effective veto power over the president's nominees. The test itself, introduced in the wake of *Reformasi*, was supposed to help the government weed out unsuitable candidates for high public office. But, obviously, the test can also be abused by DPR members to solicit bribes.

On August 26, 2008, Prayitno voluntarily went to the KPK to confess that he had received ten traveler's checks each worth Rp. 50 million (about US\$5,000) two weeks after members of Commission IX voted to confirm Miranda Swaray Goeltom's appointment to BI's number two post.⁵⁰ Prayitno claimed that he received the money while he was at the office of Emir Moeis, who was then chairman of Commission IX, and named four fellow Commission members who, he said, had also received the same amount of money at the chairman's office.⁵¹ The PPATK,⁵² the country's Financial Transaction Reports & Analysis Center, reported that a total of 480 traveler's checks, each worth Rp. 50 million and totaling Rp. 23 billion (about US\$2.3 million), had been cashed shortly after Miranda's appointment.⁵³ Yunus Husein, the PPATK chief, an-

⁴⁹ *Komisi Pemberantasan Korupsi*. The KPK was established pursuant to Law No. 30/2002. It was designed to investigate and prosecute complex corruption cases. The cases prosecuted by the KPK are tried before the Tipikor.

⁵⁰ ‘Lawmaker briefs KPK over new BI scandal’, *Jakarta Post*, August 27, 2008.

⁵¹ ‘KPK steps up investigation into new BI scandal’, *Jakarta Post*, September 15, 2008.

⁵² *Pusat Pelaporan dan Analisis Transaksi Keuangan*. Established pursuant to Law No. 15/2002, as amended by Law No. 25/2003, the PPATK was designed to analyze suspicious financial transactions that may be related to money laundering, terrorist financing, and other serious crimes such as corruption. It began operations on October 17, 2003.

⁵³ ‘Artha Graha denies involvement in Bank Indonesia bribery scandal’, *Jakarta Post*, September 29, 2008.

nounced that 102 persons, including several members of the DPR, had cashed the traveler's checks. He refused to divulge the names of the DPR members involved, although he speculated that some DPR members, in an effort to shield themselves, may not have cashed the checks themselves but have instead asked close associates or family members to cash the checks for them.⁵⁴

The traveler's checks have been traced back to PT First Mujur, a company with alleged ties to Bank Artha Graha International.⁵⁵ Artha Graha is, in turn, controlled by businessman Tomy Winata.⁵⁶ Andy Kasih, Artha Graha's chief executive, has denied the bank's involvement in the scandal but confirmed that the bank had purchased the traveler's checks from Bank Internasional Indonesia (BII) on First Mujur's instructions. Kasih said that it wasn't his place to ask the bank's client what it was planning to do with the traveler's checks.⁵⁷ First Mujur's business is palm oil plantations. What motive could it have for bribing 41 members of Commission IX, to the tune of about US \$2.3 million, to confirm Miranda Goeltom's nomination to BI's number two position? Probably none.⁵⁸ An interesting possibility is that the money came from several sources, all with an interest in securing a sympathetic ear in BI. As the number two, Goeltom was responsible for banking supervision, with the governor being mainly responsible for macroeconomic issues and monetary policy. Thus any person or corporation involved in banking or planning to become involved in banking would

⁵⁴ 'Whistle-blower fails to convince KPK to open BI probe', *Jakarta Post*, January 20, 2009.

⁵⁵ An investigation by *Tempo Magazine* ('A Not So Fortunate Company', September 23, 2008) revealed no evident connection between Bank Artha Graha International and PT First Mujur aside from the fact that First Mujur's offices are located on the 27th floor of the Artha Graha Building in Jakarta, although First Mujur's headquarters are supposed to be located in Medan.

⁵⁶ Winata first came to prominence under the New Order when he developed close ties to the Indonesian military. In 1989, Winata teamed up with the military's pension fund, Kartika Eka Paksi, to buy an ailing bank which he subsequently renamed Bank Artha Graha International. He was also a business partner of Bambang Trihatmodjo, one of President Soeharto's sons. Reportedly, Winata has remained politically well connected in the post-Soeharto era (*FEER*, 23/10/2003). In March 2003, Winata brought a criminal libel suit against *Tempo Magazine*, which had published an article 'Ada Tomy di Tanah Abang?' ('Was Tomy in Tanah Abang?') on March 3, 2003, discussing rumors that Winata might have been involved in a fire that destroyed an old textile market in Jakarta's Tanah Abang district in February of that year. Relying on a source inside the Jakarta city government, the *Tempo* article alleged that Winata had, in fact, filed a redevelopment plan for the area (*AT*, 18/9/2004). Winata's libel suit went all the way to Supreme Court, where *Tempo* eventually prevailed in 2006.

⁵⁷ 'Artha Graha denies involvement in Bank Indonesia bribery scandal', *Jakarta Post*, September 29, 2008.

⁵⁸ First Mujur's role in the Goeltom affair remains a mystery but the reasoning is that the company was being used as a conduit for the bribery by, among others, Tomy Winata who is suspected of having ties to First Mujur. Mr. Winata has denied any involvement in the scandal ('A Tale of Vote-Buying', *Tempo Magazine*, September 23, 2008; 'A Bonus from the Bank', *Tempo Magazine*, September 23, 2008).

have an interest in contributing to the pool of money that eventually found its way to the DPR.⁵⁹

It just so happened that Goeltom was involved in several questionable decisions shortly after she assumed the number two position at BI. In April 2005, BI gave its permission to Sinar Mas to acquire Bank Shinta. This decision was controversial because the Widjaja family, the controlling shareholder of Sinar Mas, had lost its banking licence when its bank, BII, was sold off after the 1997-98 financial crisis. Thus, technically Sinar Mas should not have been allowed to re-enter the banking market. A Sinar Mas senior executive later confirmed that he had a close relationship with Goeltom as well as Burhanuddin Abdullah but denied that the relationship had any bearing on BI's decision to let Sinar Mas acquire Bank Shinta.⁶⁰ Also controversial was BI's decision in June 2005 not to prosecute Lippo Karawaci, a subsidiary of the Lippo Group controlled by the Riady family, for illegal banking. Karawaci was a real estate developer that had issued debt instruments collateralized by real estate parcels known as the Serasi Lots. A number of these debt instruments, forged by a local Lippo Bank branch manager, brought the scheme to the attention of bank supervisors at BI. It was reported that Goeltom was instrumental in BI's eventual decision not to prosecute. This decision became controversial due to Goeltom's close association to a senior member of the Lippo Group "known to be a trusted confidant of the Riady family." But the possibility of collusion was subsequently denied by a Karawaci executive.⁶¹

The KPK is still pursuing its investigation of the Goeltom affair but it is taking its time. This has led anti-corruption NGOs to accuse the KPK of playing politics.⁶² The KPK, meanwhile, has argued that the Goeltom affair is considerably more complicated than the first BI corruption scandal because the only link between Goeltom and the traveler's checks is one Nunun Nurbaeti Daradjatun, wife of former deputy chief of the National Police and current PKS member of the DPR. Allegedly, Nunun acted as conduit for the checks and had instructed her employee, Arie Malangjudo, to act as bagman and distribute the checks to four DPR members—Hamka Yandhu (Golkar), Dudhie Makmun Murod (PDI-P), Endin Soefihara (PPP), and Udju Djuhaeri

⁵⁹ 'A Tale of Vote-Buying', *Tempo Magazine*, September 23, 2008.

⁶⁰ 'Seeking a Stable', *Tempo Magazine*, September 2, 2008.

⁶¹ 'Seeking a Stable', *Tempo Magazine*, September 2, 2008.

⁶² 'Whistle-blower fails to convince KPK to open BI probe', *Jakarta Post*, January 20, 2009.

(TNI/Polri)—who, in turn, were to distribute them to the members of their respective parties who had served on Commission IX.⁶³ Nunun has since escaped to Singapore where she is reportedly undergoing treatment for Alzheimer's!⁶⁴ The KPK has not moved against Nunun; nor has it declared Goeltom a suspect. Although Prayitno has testified that Goeltom had actually met with him and several other PDI-P legislators at the Dharmawangsa Hotel in Jakarta prior to the DPR vote in June 2004, others implicated in the scandal have denied that the meeting actually took place. Moreover, Prayitno admitted that Goeltom never mentioned money at the alleged meeting.⁶⁵ One thing is certain, however: 480 traveler's checks totaling about US\$2.3 million were doled out and a number of DPR members suspected of receiving them have reportedly admitted as much.⁶⁶ Moreover, the PPATK's report to the KPK, stating that a number of DPR members had indeed cashed traveler's checks, has made plain that members of Commission IX were being bribed. The only questions that remain are by whom and for what?

It took the KPK almost a year to bring charges against the four DPR members who distributed the checks to their DPR colleagues and eventually succeeded in getting the Tipikor to convict and send them to jail by mid-2010. In late January 2011, the KPK arrested 19 legislators and former legislators, including Golkar's Paskah Suzetta. A few days later, the KPK arrested three more, bringing the total up to 22. The 22 are now in detention and awaiting trial.⁶⁷

These two bribery scandals involving BI and the DPR are illustrative of how important a role money politics plays in the Indonesian political process. Money politics has clearly become as important a feature as political capitalism in Indonesia. As such, KKN as an informal institution has become more entrenched.

II. The Tipikor: A Stepchild of the Indonesian Judiciary

Given the importance of KKN as an informal institution to the long-term viability of the existing political power structure, it should not be surprising that there would be resistance to the Tipikor. Note, however, that there was no overt stance made against the Tipikor. Instead of direct attacks, the strategy, as it was with the

⁶³ 'Go to Jail . . . Directly to Jail', *Tempo Magazine*, No. 24/XI, February 9-15, 2011.

⁶⁴ 'One to Go', *Tempo Magazine*, No. 24/XI, February 9-15, 2011.

⁶⁵ 'Lawmaker briefs KPK over new BI scandal', *Jakarta Post*, August 27, 2008.

⁶⁶ 'Raining Checks in Senayan', *Tempo Magazine*, September 16, 2008.

⁶⁷ 'Locked Up by His "Enemies"', *Tempo Magazine*, No. 24/XI, February 9-15, 2011.

Commercial Court, was simply to allow the Tipikor to fail. Thus the story was one of willful neglect. From the very beginning, the Tipikor had always been a stepchild of the Indonesian judiciary. The Supreme Court, whose responsibility it was to insure the viability and independence of the Tipikor, failed to live up to that responsibility. On March 19, 2003, Kwik Kian Gie, the then-Minister for National Development Planning, issued Ministerial Decree No. 025/M.PPN/03/ 2003, authorizing the formation of a Steering Committee⁶⁸ whose task would be to lay the groundwork for the establishment of the Tipikor. Pursuant to the ministerial decree, two justices of the Supreme Court—Paulus Lotulung and Marianna Sutadi—were appointed chairperson and vice-chairperson of the Committee, respectively. Members of the Committee came from the government, the judiciary, academia, NGOs active in governance reform, and lawyers from private practice. Diani Sadiawati, director of law and human rights at Bappenas⁶⁹—the National Development Planning Agency—served as secretary to the Committee. Thus, all stakeholders and interested parties were well represented in the Committee.

The Committee's mission was to publish a 'blueprint' containing specific recommendations as to how the Tipikor was to be established with regards to its 'recruitment system, development of human resources, organization, procedural law, supervision, and equipment and infrastructure support for judges of the Tipikor' (Ministerial Decree No. 025/M.PPN/03/2003, at ¶ 2(4)). The *Blueprint and Action Plan for the Establishment of the Anticorruption Court* (hereinafter, 'Blueprint') was published on March 15, 2004. According to the Blueprint's 'Action Plan' (Blueprint 2004: 61-80), it was the Supreme Court that bore most of the responsibilities for implementing the Blueprint's recommendations. But many, if not most, of these recommendations were never implemented. Indeed, the Supreme Court never bothered to set up a special committee in-house to implement the Blueprint's recommendations but left it, instead, to six existing committees within the Supreme Court responsible for judicial reform.⁷⁰

⁶⁸ The Steering Committee actually had dual responsibility for both the Commercial Court and the Tipikor.

⁶⁹ *Badan Perencanaan dan Pembangunan Nasional*.

⁷⁰ The six committees are responsible for (1) case management, (2) information technology, (3) supervision, (4) finance, (5) human resources, and (6) training. The committee on human resources is responsible for recruitment, promotions and transfers, whereas the one on supervision is responsible for supervising judges and the bureaucrats within the judiciary. The day-to-day coordination of these six committees was the responsibility of Justice Paulus Lotulung. (Interview with Wiwiek Awiati, Consultant to the Judicial Reform Committee in the Supreme Court of Indonesia.)

Many of these recommendations were designed to insulate the Tipikor from the Central Jakarta District Court. Many lessons had been learned from the disastrous experience of the Commercial Court. Its decisions in the *Manulife* and *Prudential* cases were the most notorious. But, as shown above, many cases during the early life of the court also added to its reputation as the premier example of what *not* to do when establishing a new court. For example, reformers recalled that the chief judge of the Central Jakarta District Court was able to determine the distribution of cases as well as the composition of panels of judges that heard them in such a way as to affect the outcome (LeIP 2002: 13). Thus, the Blueprint had recommended that a special deputy chief judge responsible exclusively for the Tipikor be appointed to administer and oversee the operations of the new court. However, pursuant to Article 11(1) of Law No. 2/1986, each district court is only allowed one deputy chief judge. The Blueprint recommendation, therefore, required a change in the existing law. The task of making sure that this law was amended was delegated to the Supreme Court (Blueprint 2004: 61-62). According to Rifqi Assegaf, his recommendation was never implemented.⁷¹

Similarly, the Supreme Court never implemented the Blueprint recommendation that a deputy registrar exclusively responsible for anticorruption cases be appointed. Corruption in Indonesian courts often involved registry personnel. The Supreme Court also failed to carry out its responsibility to insure that the Tipikor's budget be kept strictly separate from the budget of the Central Jakarta District Court (Blueprint 2004: 62-63). The purpose here was to prevent the district court from using funds intended for the Tipikor and, in the process, perhaps deprive the Tipikor of the funds it needs to carry out its mandate (p. 9).⁷² Recall that the Supreme Court had successfully resisted the appointment of a special deputy chief judge and registrar for the Commercial Court. Unable to resist officially the innovations designed to insulate the Tipikor, it appeared that the Supreme Court attempted to evade them unofficially.

The Supreme Court had poorly equipped the Tipikor. A 2007 visit to its premises on Jalan H.R. Rasuna Said in Jakarta showed that the court is making do with the bare necessities. The judges had no access to any secretarial support and, judging from the state of the facilities, probably only the minimum of janitorial support. In the judges' 'chambers', which all the judges have to share, there was only one photocopier

⁷¹ Interview with Rifqi S. Assegaf, Executive Director of LeIP (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan* or Indonesian Institute for an Independent Judiciary), in Jakarta, April 10, 2007.

⁷² Ibid.

in evidence. There were no computers, no laser printers, and no library. In the beginning, the judges even had to buy their own printer paper and ink. According to I Made Hendra Kusuma, ad hoc judge at the Tipikor, it was not until May 2006, about 10 months after the court was officially established, that these basic stationery supplies began to be provided.⁷³ The judges also had to resort to their own pockets to buy the books necessary for legal research. A court stenographer was provided but, according to Ad Hoc Judge Dudu Duswara Machmudin, the judges had little faith in the fidelity of the records thus provided.⁷⁴ A CCTV camera to record court proceedings has now been installed, but the money needed to pay for the system was provided by the KPK and not the Supreme Court.⁷⁵

Perhaps most controversial was the Supreme Court's failure to make sure that sufficient funds were available to pay the salaries of the ad hoc judges appointed to the Tipikor.⁷⁶ Article 58(2) of Law No. 30/2002 provided that persons accused of corruption be tried by a panel consisting of two career judges and three ad hoc judges. The ad hoc judges were appointed by Presidential Decree (Keppres) No. 111/M/2004, signed by President Megawati Soekarnoputri on July 26, 2004. But their investiture as judges of the Tipikor did not take place until October 7, 2004. It is unclear which of these two dates marked the beginning of their appointment as ad hoc judges of the Tipikor. Ad Hoc Judge Dudu Duswara Machmudin believed that his appointment began on July 26, 2004, since this was the date on which he was required to relinquish his post as associate law professor at Langlangbuana University.⁷⁷ If we take this date as the beginning of the ad hoc judges' appointment, then it was to take over 13 months before they received their official salary. President Susilo Bambang Yudhoyono signed Presidential Regulation (Perpres) No. 49/2005, authorizing payment of a monthly salary of Rp. 10 million on July 27, 2005—a year and one day after his predecessor signed the decree appointing the ad hoc judges. Reportedly, however, Per-

⁷³ Interview with I Made Hendra Kusuma, Ad Hoc Judge at the Anti-Corruption Court, in Jakarta, April 18, 2007. Judge Kusuma, along with Judge Dudu Duswara Machmudin and Judge Achmad Linoh, were the first ad hoc judges appointed to the Tipikor.

⁷⁴ Interview with Dudu Duswara Machmudin, Ad Hoc Judge at the Anti-Corruption Court, in Jakarta on May 10, 2007.

⁷⁵ Interviews with Judges Kusuma and Machmuddin.

⁷⁶ 'Puasa Gaji Sang Hakim' ['Judges on Salary Fast'], *Koran Tempo*, December 12, 2004; 'Insya Allah, Bulan Depan Gajian' ['God Willing, We'll Get Paid Next Month'], *Pilars*, March 13, 2005; 'Lebih baik menun-tut hak dari pada bermain mata' ['Suing is better than flirting'], *Forum Keadilan*, March 22, 2005).

⁷⁷ Interview with Judge Machmuddin. Ad hoc judges serving on the Tipikor are required by statute to resign from any and all prior employment (Article 57(2)(i) of Law No. 30/2002).

pres No. 49/2005 was to take over a month to travel the short distance from the Cabinet Secretary's office to the Supreme Court. It did not get there until August 30, 2005.⁷⁸

To be fair, the judges had been given loans—initially from Bappenas and subsequently from the Supreme Court—to tide them over. The first of these loans were given to the ad hoc judges on February 5, 2005—four months after their investiture or six months after their appointment as ad hoc judges.⁷⁹ One can only speculate as to whether loans would have been advanced had there not been a public outcry in the press.⁸⁰ The ad hoc judges had complained that they had gone through their savings and were living off their credit cards.⁸¹ There was a concern that given the situation, the three ad hoc judges, too, would fall prey to the temptation that had clearly overtaken most of the career judiciary. Achmad Linoh, an ad hoc judge at the Tipikor, believed that the Supreme Court's failure to make timely arrangements for the ad hoc judges' salaries was done on purpose to tempt them into receiving bribes.⁸² Judge Machmudin also believed that the oversight was intentional but that its purpose was to intimidate them into resigning.⁸³

How serious was the Indonesian government in its declared intention to combat corruption? The government and the Supreme Court had about 16 months in which to prepare the budget of the Tipikor from March 19, 2003, when the establishment of the Steering Committee was authorized, to the date that the ad hoc judges were appointed on July 26, 2003. More than ample time, one would have thought, for a concerted effort to prepare the groundwork for what was ostensibly an important national objective. Indeed, a pro forma budget, which included judicial salaries, had in fact been published in mid-January 2004 along with the Bluebook (2004: Appendix 2). According to Pande Radja Silalahi, senior economics fellow at the Centre for Strategic & International Studies in Jakarta, it is the practice of the Department of Finance to ask each government department every April whether their respective budgets for the cur-

⁷⁸ 'Perpres Gaji Hakim Tipikor Turun, Realisasinya Ditunggu' ['Presidential Regulation on Tipikor Judges' Salary Issued, Still Awaiting Implementation Date'], *Kompas*, September 1, 2005.

⁷⁹ 'Hakim Digaji dari Utang' ['Judges Get Loans as Salary'], *Indonesia Pos*, February 6, 2005.

⁸⁰ 'Puasa Gaji Sang Hakim' ['Judges on Salary Fast'], *Koran Tempo*, 12/12/2004.

⁸¹ 'Malangnya Hakim Antikorupsi' ['Misfortune of Anti-Corruption Judges'], *Koran Tempo*, 20/2/2005.

⁸² Interview with Achmad Linoh, Ad Hoc Judge on the Anti-Corruption Court, in Jakarta, May 10, 2007.

⁸³ Interview with Judge Machmuddin.

rent fiscal year are adequate to meet their expenditure.⁸⁴ Thus, ostensibly, there was time, even counting from the time that the Blueprint was published, for the Supreme Court to ask for supplementary funding. In fact, an alert Supreme Court would have had the chance to take the budgetary needs of the Tipikor into account in April of 2003. April is the month when the Supreme Court normally begins to calculate its budgetary needs for the following fiscal year.⁸⁵ It is unclear whether the issue of the Tipikor's budget was raised at that time, but in any event the funding needs of the Tipikor were not included in the Supreme Court's budget for 2004.

The Supreme Court was not only well represented in the Steering Committee, it also enjoyed a leadership position since the chair and vice-chair were both occupied by Supreme Court justices. But the perception within the Supreme Court was that the Tipikor was an artifice imposed from the outside. The Supreme Court, thus, had no sense of ownership over the project.⁸⁶ Worse—the very existence of the Tipikor could be and was construed as an indictment of the career judiciary's competence and integrity. With hindsight, therefore, one could argue that the Supreme Court should have been the last institution to be trusted to ensure the welfare of the Tipikor.

But full judicial independence was one of the rallying cries of *Reformasi*. To many Indonesians tired of the pervasive government interference in judicial affairs during the New Order, judicial independence meant one thing; but to the judiciary itself it meant another. The picture was perhaps not all that different from the one Lev (1978) described about the struggle for a *negara hukum* (a state based on law) during the early years of the New Order. To judges then, judicial independence simply meant more prestige and status. During the early days of *Reformasi*, the emphasis was not on cleaning house and stemming the tide of KKN within the judiciary, but on gaining the responsibility for administering the personnel and financial aspects of the lower courts; it was, as shown in chapter 4, about bringing all aspects of the judiciary under 'one roof' (Assegaf 2007).

This 'one roof' policy had already gained momentum by the time that planning for the establishment of the Tipikor got underway. Law No. 4/2004, the law that regu-

⁸⁴ Interview with Pande Radja Silalahi, Senior Fellow, Department of Economics, Centre for Strategic & International Studies, in Jakarta, May 3, 2007.

⁸⁵ Interview with Wiwiek Awiati, Executive Secretary to the Supreme Court Judicial Reform Team, in Jakarta, April 25 & May 26, 2005.

⁸⁶ Interviews with Rifqi Assegaf and Wiwiek Awiati. Interview with Diani Sadiawati, Director of Law and Human Rights, Bappenas (*Badan Perencanaan Pembangunan Nasional Republik Indonesia* or National Development Planning Agency of the Republic of Indonesia), in Jakarta, April 25, 2007.

lated the power of the judiciary, was enacted on the same day that the Blueprint (2004) was published on January 15 of that year.⁸⁷ There was probably very little incentive for the Ministry of Justice and Human Rights, the government department in charge of the administration of the lower courts before the advent of the ‘one roof’ system, to be proactive in ensuring the welfare of the Tipikor.

To be fair to the current incumbent of Merdeka Palace, all of the planning for the Tipikor had been more or less completed by the time he was sworn into office on October 20, 2004. But perhaps he could have done more to insure that the Blueprint (2004) was fully implemented given his strong anti-corruption campaign pledges. It still remains a mystery, for example, why Perpres No. 49/2005, the presidential regulation authorizing the payment of the ad hoc judges’ salaries, took over a month to get from the Cabinet Secretary’s office to the Supreme Court, just a few buildings away. Given his campaign pledges, it was also strange that President Yudhoyono did not react to the very public outcry in the media about the non-payment of the ad hoc judges’ salaries.

A. Ad Hoc Judges: Indonesia’s Thin Blue Line

Despite the willful neglect by the Supreme Court, the Tipikor has succeeded. As of July 2007, it has tried 33 corruption suspects and found them all guilty as charged. Sentences meted out ranged from a low of 18 months to a high of 11 years imprisonment. Substantial fines have been levied and demands for restitution have been made. The Tipikor’s success has been attributed chiefly to the ad hoc judges.

Teten Masduki, then-director of ICW⁸⁸ and now secretary-general of Transparency International Indonesia, believed that the ad hoc judges have made a crucial difference.⁸⁹ Precisely because they are not part of the career judiciary, they are far less deferential in their attitudes towards the authority of the Supreme Court. This is perhaps best illustrated by the controversy that raged during the Harini Wijoso trial. A former career judge turned advocate, Wijoso was the lawyer representing Probosutedjo on his appeal to the Supreme Court. The former President Soeharto’s half-brother had

⁸⁷ Law No. 4/2004 superseded Law No. 14/1970.

⁸⁸ Indonesia Corruption Watch, an anti-corruption NGO.

⁸⁹ Interview with Teten Masduki, Coordinator of ICW, in Jakarta, April 9, 2007.

been tried and found guilty of corruption.⁹⁰ Wijoso was caught attempting to bribe Supreme Court justices, allegedly including Chief Justice Bagir Manan, who were reviewing a cassation petition of Probosutedjo's case. Probosutedjo claimed that he had given Wijoso Rp. 6 billion (or about US\$665,000) with which to bribe the Supreme Court justices.⁹¹ Wijoso was subsequently tried for corruption before the Tipikor. During her trial, the prosecutor demanded that Bagir Manan appear before the court as a witness. Kresna Menon and Sutiyono, the two career judges on the panel, refused to summon Bagir Manan to appear before the court. Pursuant to Article 160(1)(c) of Indonesia's Code of Criminal Procedure, all witnesses called by either the prosecution or the defense must appear before the court to give testimony. There are no exceptions.⁹² After repeated but unsuccessful entreaties by the three ad hoc judges for the court to summon Bagir Manan, they decided to 'walk out' in protest.⁹³ They were subsequently replaced by three other ad hoc judges.⁹⁴ Judge Sutiyono later reportedly admitted to the Judicial Commission that he thought calling Chief Justice Bagir Manan to the stand would have been the correct thing to do legally but that concern for his own career prospects made him decide otherwise.⁹⁵

The ad hoc judges, who are drawn from outside the career judiciary—mostly from private practice and academia—therefore provide a much-needed counterweight in terms of integrity and independence. In the case of the Tipikor, the initial three ad hoc trial judges were selected from an original pool of over 800 candidates.⁹⁶ Applications were solicited through an advertisement in the mass media. The candidates were first subjected to an administrative test to make sure that they met the requirements set forth in the statute. They were then examined on their knowledge of the law. Those

⁹⁰ Probosutedjo had been given a four-year jail term by the Central Jakarta District Court for abusing reforestation funds. His sentence was later reduced on appeal to two years by the Jakarta High Court ('Probo's Case Highlights Corrupt System: Experts', *Jakarta Post*, October 17, 2005).

⁹¹ 'Probo's Case Highlights Corrupt System: Experts', *Jakarta Post*, October 17, 2005.

⁹² In defense of his position, Judge Menon argued that pursuant to a 1985 Supreme Court Circular (*Surat Edaran* No. 2/1985), it was up to his discretion, as chairman of the panel, to limit the number of witnesses each side is able to present. The issue is whether a 1985 Supreme Court Circular should trump an article of the Code of Criminal Procedure.

⁹³ The three ad hoc judges involved were I Made Hendra Kusuma, Achmad Linoh and Dudu Duswara Machmudin.

⁹⁴ 'Malang Nian Nasib Tiga Hakim "ad Hoc"' ['Misfortune of Three "ad hoc" Judges'], *Media Indonesia*, June 13, 2006; 'Replacement of antigraft court judges unfair: Todung', *Jakarta Post*, June 15, 2006.

⁹⁵ 'Tiga Hakim Lakukan Perlawanan Moral' [Three Judges Taking a Moral Stance'], *Kompas*, May 4, 2006; 'Independensi Hakim Versus Loyalitas Bawahan' ['Judicial Independence versus a Subordinate's Loyalty'], *Kompas*, June 14, 2006.

⁹⁶ Interview with Judge Kusuma.

who successfully passed the legal knowledge test were subjected to extensive psychological testing administered by an independent firm to see whether they had the character and personality suitable for the job, including honesty and independence. At this stage, the names of successful candidates were published in the media and public comments were invited. Throughout this process, various NGOs active in legal and judicial reforms and anti-corruption⁹⁷ conducted background checks on more than 20 leading candidates.⁹⁸ The final phase was the ‘fit-and-proper’ test, during which the final few candidates were once again questioned to ascertain their fitness for the job and to address any public comments that had been received. The selection process was objective, thorough, and transparent. Interestingly, the task of recruiting the ad hoc judges was not left to the Supreme Court but to a selection committee comprised of Supreme Court justices as well as individuals outside the judiciary and outside the government. Committee members from outside the judiciary plus some reform-minded judges helped to set higher standards in terms of both competence and integrity as well as independence than would otherwise have been achieved.⁹⁹

The panels of judges in the Tipikor always comprise of three ad hoc judges and two career judges. Thus, the ad hoc judges are always in the majority. An advocate pleading a client’s case has to convince at least one ad hoc judge of the client’s innocence. In practice, this structure has proved formidable and where a unanimous verdict has not been reached, the split has typically been three ad hoc judges against two career judges, voting to convict. This has been the pattern since the *Abdullah Puteh* case. Where this pattern has not held has been at the sentencing phase and has resulted in more lenient sentences than demanded by the prosecution.¹⁰⁰ This rule of having three ad hoc judges and two career judges serving in one panel is replicated at both the appellate level and at cassation in the Supreme Court and probably explains why, to date, no Tipikor verdict has been reversed. Given that corruption permeates all levels of the judiciary, including the Supreme Court (Reksodiputro 2002: 42), reversals of Tipikor decisions would probably have been more common had it not been for the presence of ad hoc judges sitting at the appellate level and in the Supreme Court.

⁹⁷ They included LeIP, PSHK, ICW, KRHN, MaPPI and YLBHI.

⁹⁸ Interview with Rifqi Assegaf.

⁹⁹ Ibid.

¹⁰⁰ Interview with Judge Machmuddin.

Ironically, the harsh treatment of the first three ad hoc judges at the hands of the Supreme Court probably contributed to an enhanced *esprit de corps* among them.¹⁰¹ When first appointed, Ad Hoc Judges Dudu Duswara Machmudin, Achmad Linoh, and I Made Hendra Kusuma had to share an apartment for about 18 months.¹⁰² In addition to not having their salaries regularized in a timely manner, the three judges also experienced other humiliations in common. For example, the ad hoc judges had been promised the use of two official cars but saw only one old car, which was subsequently commandeered for use by the chief judge of the Central Jakarta District Court.¹⁰³ The unreliable nature of Jakarta's public transportation made it an unacceptable option for the ad hoc judges. In any case, it would not have been in keeping with their status as judges for them to resort to buses; so, they at first resorted to taxis and subsequently purchased their own vehicles.

Because so much of their personal and professional needs had not been properly met by the Supreme Court, the ad hoc judges eventually turned to the KPK for help. As already noted above, when the court needed a more reliable form of recordkeeping, it was the KPK that came to the rescue with a CCTV system. As a result of this relationship, the Tipikor has sometimes been seen simply as an arm of the KPK and not really independent. Reformers who should have been sympathetic to the Tipikor and hail it as a success began to question whether a person accused of corruption could really get a fair trial before the Tipikor.¹⁰⁴

But the criticism may be a little harsh. The KPK has contributed to the Tipikor's success by bringing well-prepared solid cases before the court. Pursuant to Article 40 of Law No. 30/2002, the KPK is not allowed to terminate a case once it has named a suspect. Corruption among the public prosecutors meant that investigations and prosecutions are often terminated early upon the issuance of an SP3 (*Surat Perintah Perhentian Perkara* or Order to Close a Case). An SP3 is often 'purchased' by a suspect from the prosecutors. Article 40 of the KPK law was intended to stop this practice from taking hold in the KPK. Accordingly, the KPK chooses its cases very carefully and only prosecutes those where the evidence is compelling. Teten Masduki believed that Article 40 had been key to the KPK bringing strong and solid cases be-

¹⁰¹ Interviews with Judges Machmuddin & Linoh.

¹⁰² Interview with Judge Machmuddin.

¹⁰³ Interviews with Judges Machmuddin and Kusuma.

¹⁰⁴ Interview with Frans Hendra Winarta.

fore the Tipikor.¹⁰⁵ Supporters of the Tipikor argue that it is this practice that explains the 100-percent conviction rate at the Tipikor, rather than improper judicial conduct towards the KPK.

B. *Is the Tipikor Doomed?*

Indonesia's obligation to conform its anti-corruption laws with the United Nations Convention Against Corruption (UNCAC), which the government signed on December 18, 2003, and subsequently ratified on September 19, 2006 (Law No. 7/2006), provided Tipikor foes with an opportunity to renew their attack on the court. In January 2006, Hamid Awaluddin, the then-minister of justice, established a committee to draft a new anti-corruption law to replace the existing laws: Law No. 31/1999, as amended by Law No. 20/2001. These two statutes set forth the substantive standards of what constitutes acts of criminal corruption and provided for the applicable penalties for such acts, including fines and terms of imprisonment. They also set forth rules governing the admissibility of evidence, burden of proof, embezzlement, falsification and destruction of records, restitution, and a *de minimis* provision. Interestingly, Article 43 of the 1999 statute also provided for the establishment of the KPK. It was Zain Badjeber, a PPP legislator, who had been instrumental in pushing that particular agenda.¹⁰⁶

Badjeber was one of the drafters of Law No. 31/1999. Article 26 of the government's draft of what was to become the 1999 statute made plain that enforcement of the law was to be handled by the police and the Attorney General's Office (AGO) in the usual manner. Badjeber objected, arguing that corruption was an "extraordinary" crime and therefore needed extraordinary enforcement measures. He had no faith that either the police or the AGO would enforce the new anti-corruption law properly and convinced the leadership of his party that demanding an entirely new enforcement body was the correct thing to do. He proposed an amendment to Article 26 (which lat-

¹⁰⁵ Interview with Teten Masduki.

¹⁰⁶ Zain Badjeber has been involved in the DPR since 1966. In the early days he belonged to the *Nadhlatul Ulama* (NU), an Islamic party. In 1973, the NU along with three other Islamic parties were forced to merge and reorganize themselves as the PPP (*Partai Persatuan Pembangunan*, the United Development Party). But it was only in 1992 that he devoted himself to full-time party politics. He retired from the DPR in 2004 and is now a consultant (*tenaga ahli*) to the Attorney General of Indonesia. He is a lawyer by profession and prior to joining the DPR, had served as a judge—first at the Gorontalo District Court from 1958 till 1962 and subsequently at the Manado District Court from 1962 till 1966. I interviewed Mr. Badjeber in Jakarta on November 16 and 21, 2007.

er became Article 27 in the new law), minimizing the involvement of the police and AGO in enforcing the new law.¹⁰⁷

Muladi, the then-Minister of Justice, as well as a number of other parties in the DPR objected to Badjeber's proposal. He and the PPP retaliated by threatening not to support the new law unless their version of Article 26 was accepted. This was very important because without the PPP's support for the law, there would be no *musyawarah* (consultation) and no *mufakat* (consensus). In Indonesia, problems are traditionally solved through a process of discussion in which every stakeholder is consulted and does not end until there is unanimity on a compromise acceptable to all. As Badjeber explained, it was possible to put the legislation to a majority vote, but such a move would have tainted its legitimacy. It is simply not the Indonesian way to govern by majority rule. So the government and the dissenting parties accepted his proposed change to avoid the prospect of unending debate.¹⁰⁸

Having accepted the change Badjeber and the PPP proposed, the DPR then drafted and incorporated an article (Article 43) into the new law, which provided for the creation of the KPK within two years of enactment of Law No. 31/1999. But this was not accomplished without further controversies. The military faction in the DPR, protecting its own turf, refused to cooperate if the KPK were to replace the police altogether since, at that time, the National Police (*Polri*) was still part of the military. Badjeber accepted a compromise and added two words—"coordinate and supervise"—to paragraph (2) of Article 43.¹⁰⁹ Under the compromise, the KPK would coordinate and supervise the enforcement of the new anticorruption law, including the efforts of the police and the AGO, but the latter would also play a role in enforcing the statute. Note, however, that although the KPK has the authority, by virtue of Article 43(2), to take over cases being handled by the AGO and the police (there is an MOU between the KPK and the AGO and the Police over supervision), the KPK has never done so. The KPK will only look into whether a certain case is progressing properly but will refrain from exercising quality control over the substance of an indictment brought by the AGO.¹¹⁰

¹⁰⁷ Interview with Zain Badjeber.

¹⁰⁸ Ibid.

¹⁰⁹ Article 43(2) reads in full: "The commission as referred to in paragraph (1) [of this Article] shall have the task and authority to coordinate and supervise, as well as to inquire, investigate and press charges in accordance with the provisions of the applicable laws and regulations."

¹¹⁰ Interview with Zain Badjeber.

Andi Hamzah¹¹¹—whom Hamid Awaluddin, President Yudhoyono’s minister of justice, appointed in January 2006 to chair the government’s committee to draft the new anti-corruption law to bring it into conformity with UNCAC—stirred up controversy when he argued that corruption should not be considered an “extraordinary” crime.¹¹² Hamzah believed that many incidents of corruption, such as bribing a police officer to avoid getting a speeding ticket, are so penny ante and commonplace that they cannot conceivably be declared “extraordinary.” He admitted, however, that some incidents of corruption, such as the BLBI scandal, involved such vast amounts of money that they could be properly considered “extraordinary”. But because there is no generic act of corruption, he argued that there was no ground for declaring all acts of corruption as “extraordinary”.¹¹³

Romli Atmasasmita,¹¹⁴ on the other hand, argued that corruption has become so systemic in Indonesia that it can no longer be called “ordinary.” Moreover, Atmasasmita pointed out, the preamble to the 2001 statute that amended Law 31/1999 specifically stated that corruption has become so pervasive that it has “not only resulted in financial losses to the state but has also violated the social and economic rights of the people.” He argued that the effects of corruption are felt throughout the entire socio-economic system in Indonesia and results in the impoverishment of millions of Indonesians. Ipso facto, then, corruption is not an “ordinary” crime as Hamzah has claimed. Corruption, as the preamble of the 2001 statute went on to state, has to be considered “a crime that must be eradicated in an *extraordinary* way” (emphasis added).

Of course, this debate is not merely about semantics. If corruption were considered an “ordinary” crime under the new law, then “extraordinary” measures would not be necessary to combat it. Thus there would be no need for a special agency like the KPK to investigate and prosecute corruption cases and, by extension, no need for a special court like the Tipikor, which was established uniquely to try corruption cases

¹¹¹ Prof. Dr. Andi Hamzah is professor of criminal law at Trisakti University in Jakarta. Prior to joining academia, he worked as a prosecutor in the Attorney General’s Office. I interviewed Prof. Dr. Hamzah in Jakarta on May 21, 2007.

¹¹² ‘Korupsi Bukan Kejahatan Biasa’ [‘Corruption is No Ordinary Crime’], *Kompas*, April 5, 2007.

¹¹³ Interview with Prof. Hamzah.

¹¹⁴ Prof. Dr. Romli Atmasasmita taught law at Padjadjaran University in Bandung. He was also law and human rights advisor to the Minister for Development Planning at Bappenas and, in addition, acted as Indonesian law expert/consultant to USAID. Atmasasmita had been one of the chief drafters of the government’s version of the 1999 statute when he was Director-General for Law & Legislation at the Justice Department. I interviewed Prof. Dr. Atmasasmita in Jakarta on April 23, 2007.

brought by the KPK. Indeed, Hamzah said that in his version of the bill, the KPK would no longer have the authority to prosecute cases but would be restricted to investigating allegations of corruption. Hamzah explained that under Indonesia's system of law, there is only one public prosecutor; that is, the Attorney General and all his assistants. The KPK's current prosecutorial powers are inconsistent with this system and should therefore be taken away. Moreover, corruption cases would be tried in district courts throughout Indonesia before a cadre of specially-trained and selected career judges. Ad hoc judges would no longer sit on corruption tribunals because it would be impractical to recruit the 1,800 or so ad hoc judges that would be needed to staff all the tribunals in all the district courts throughout the country.¹¹⁵

Hamzah's position caused the ICW, the anti-corruption NGO, to withdraw from his committee in February 2007. ICW's Emerson Yuntho explained that debate was no longer possible within Hamzah's committee and, as such, compromise was not foreseeable. ICW and other like-minded parties went on to form their own drafting committee. It is difficult to say whether Hamzah deliberately used his committee to try to kill the KPK and the Tipikor. It is even more difficult to determine what Hamzah's motives might have been. He was certainly no fan of ad hoc judges. In a controversial statement, he had accused the Tipikor's ad hoc judges of not knowing how to do their jobs.¹¹⁶ Teten Masduki concluded that Hamzah's position was "permissive" towards corruption.¹¹⁷ But Hamzah might have simply been a judicial conservative who felt uncomfortable with using unconventional methods in prosecution and adjudication. Whatever his motives might have been, one thing is clear: if his version of the bill were to pass, the Tipikor would be doomed. To date, the DPR has not taken action on this bill. There were promises of action,¹¹⁸ but nothing has happened yet. The government sent its version of the bill to the DPR in August 2009,¹¹⁹ but so far nothing has happened.

A second opportunity to undermine the Tipikor presented itself on December 19, 2006, when Indonesia's new Constitutional Court declared the Tipikor unconstitu-

¹¹⁵ Interview with Prof. Hamzah.

¹¹⁶ 'Alarm Over Anti-Graft Court Axing', *The Age* (Melbourne), February 15, 2007.

¹¹⁷ 'Korupsi Bukan Kejahatan Biasa' ['Corruption is No Ordinary Crime'], *Kompas*, April 5, 2007.

¹¹⁸ 'RUU Tindak Pidana Korupsi Selesai Pekan Depan' [Anti-Corruption Bill Ready Next Week'], *Koran Tempo*, June 10, 2008.

¹¹⁹ 'New bill will "weaken eradication efforts"', *Jakarta Post*, August 5, 2009; 'Indonesia Corruption Watch Sets Off Alarm Over Draft Antigraft Bill', *Jakarta Globe*, September 3, 2009.

tional.¹²⁰ The Tipikor was established on the basis of Law No. 30/2002, the enabling law of the KPK. As such, it has no independent legal basis. To the Constitutional Court, this was a fatal flaw.¹²¹ More importantly, perhaps, the Constitutional Court held that the existence of the Tipikor caused a “duality” in Indonesia’s judicial system. Corruption suspects are tried before the Tipikor only if they have been prosecuted by the KPK. Those prosecuted by the Attorney General’s Office continue to be tried before the district courts. Since the Tipikor has different procedural rules from the district courts, two different persons accused of violating the same laws—Law No. 31/1999, as amended by Law No. 20/2001—would be given different protections under the law. This would violate Article 28D(1) of the 1945 Constitution, which guarantees citizens equal protection of the law. However, in a move highly atypical for a court of law, the Constitutional Court gave the government three years, that is, until December 19, 2009, in which to cure the constitutional defect of the Tipikor.¹²²

In countries where the judicial review of statutes is permitted, the normal practice would simply be to declare a law unconstitutional; whether a new law should be passed is a question left to the legislature. There is no stay of execution. This means that those convicted under the constitutionally illegitimate law would have their convictions automatically voided forthwith. Logically, those convicted of corruption by the Tipikor should also have their convictions voided because the Constitutional Court’s decision meant that the Tipikor never had legitimate jurisdiction to try them in the first place. Indeed, there was an understandable concern that, should the DPR fail to enact a new statute by December 19, 2009, all those convicted of corruption by the Tipikor would be set free. But this did not happen because, as already noted in chapter 5 above, the chief judge of the Constitutional Court publicly announced, in relation to another case, that a declaration of unconstitutionality will only have prospective effect.

A more well-founded concern was that the DPR’s failure to meet the date handed down by the Constitutional Court would result in a crippling blow to future efforts to eradicate corruption in Indonesia. The statistics on convictions and acquittals

¹²⁰ Case No. 012-016-019/PUU-IV/2006. The lawsuit to challenge the Tipikor’s constitutionality was brought by Nazaruddin Syamsuddin and Mulyana Wira Kusumah, chairman and member, respectively, of the General Elections Commission (KPU, the *Komisi Pemilihan Umum*), whom the Tipikor had convicted of graft related to the 2004 general elections.

¹²¹ Zain Badjeber argued that this was probably not the Constitutional Court’s main objection. A law requiring a government institution to have its own governing legislation does exist (Law No. 10/2004), but this law was passed *after* the enactment of the KPK law (Personal Interview).

¹²² In the interim, the Tipikor is functioning normally.

of corruption suspects tried before the regular courts would seem to validate this concern. According to ICW, of 71 corruption cases involving 243 suspects tried before the district courts in 2005,¹²³ 27 cases—that is, 38 percent—resulted in ‘not guilty’ verdicts. Of the 44 cases in which ‘guilty’ verdicts were reached, sentences of two years or less were meted out in 25 cases—that is, nearly 57 percent; whereas only in 5 cases—or just over 11 percent—were sentences higher than 5 years handed down (ICW 2005). These statistics have not improved according to ICW’s recent tally. For the first six months of 2008, 104 out of 196 suspects tried before the regular courts were acquitted; and 76 of the 92 suspects convicted were sentenced to less than two years imprisonment.¹²⁴ The dismal record of the regular courts in corruption cases was the reason that the Tipikor was established in the first place. The career judiciary simply could not be trusted to do the job. Indonesia’s career judges were and still are typically perceived as being thoroughly corrupted and neither independent nor impartial.

As it turned out, the government and the parliament did meet the December 19, 2009 deadline set by the Constitutional Court—but not by much. The DPR voted to enact the Tipikor bill on September 29, 2009, but SBY did not sign it into law (Law No. 46/2009) until a month later on October 29, 2009. Critics have expressed several huge misgivings about the law. As they feared, the law does not differ much from the government’s draft which was delivered to the DPR in late October 2008.¹²⁵ First, Article 3 of the law mandated the establishment of a Tipikor in every regency and city (the biggest political subdivision at the subprovincial level) in which a district court operates. Article 2 provides that each Tipikor would be established as part of the district court. Todung Mulya Lubis, prominent private practitioner and chairman of Transparency International Indonesia, worried that this would in effect mean the subordination of each Tipikor to the district court of which it is a part.¹²⁶ Rifqi Assegaf, executive director of LeIP, also expressed the fear that the Tipikor could be undermined by expanding its presence to every political subdivision of the country. He believed that such a move would make it very difficult for the Tipikor to recruit a sufficient number of non-career judges to sit on the courts’ panels. Without the presence of

¹²³ The cases cited included cases brought on cassation and civil review (*peninjauan kembali*) before the Supreme Court (5 cases).

¹²⁴ ‘Indonesia’s Ceaseless Corruption Campaign’, *Asia Sentinel*, August 8, 2008.

¹²⁵ ‘Bill prescribes setbacks in state’s war on corruption’, *Jakarta Post*, November 11, 2008.

¹²⁶ ‘Corruption Court Law, heavily regulated anti corruption portion’, *Jakarta Post*, October 5, 2009.

ad hoc judges on anti-corruption panels, the Tipikor would only be as good and as honest as the career judges who would staff them.¹²⁷ Mulya Lubis agreed. In addition, he is concerned that with so many anti-corruption courts to monitor, quality could not help but deteriorate because the local media and civil society groups may not be as aggressive and outspoken as those in the national capital. Moreover, with the KPK still based in Jakarta and lacking both local offices and manpower, there is also the danger that the prosecution of corruption cases would be handled by public prosecutors whose own reputation for corruption is as notorious as that of career judges. Finally, there is the question of the money required to fund the expansion.¹²⁸

On this last issue, the critics' concerns are proving real. As of April-May 2010, the Supreme Court, which has again been tasked with establishing the new courts, has expressed pessimism that even the initial seven courts planned for the country's largest cities would begin operation on time.¹²⁹ The government has so far failed to approve the Rp. 400 billion (about US\$44 million) initial budget that the Supreme Court has demanded.¹³⁰ It is by no means certain that the schedule of establishing 33 Tipikors during the first phase, one in each provincial capital, by the end of 2011 will be met. Meanwhile, this delay is already proving problematic. Two ad hoc judges at the Tipikor recently issued dissenting opinions questioning the court's jurisdiction over regional cases.¹³¹ The two judges argued that due to Law No. 46/2009, any corruption prosecution brought after October 29, 2009 would have to be heard in the district courts. There is something to be said for their argument since Article 36 of the Act's transitional provisions provides as much pending the establishment of the 33 Tipikors. Article 34(a) of these provisions states that only those cases already brought before the Jakarta Tipikor may continue to be heard there after passage of the Act. Given the shift in focus by the KPK towards prosecuting local officials for alleged corruption in their respective jurisdictions, this may prove to be a very big problem.¹³² Assuming that the initial seven Tipikors are set up according to schedule, acts of corruption committed in their respective jurisdictions may be heard by the Anti-Corruption Court but those committed in the other 25 provinces (not counting Greater Jakarta) would,

¹²⁷ Interview with Rifqi Assegaf.

¹²⁸ 'Corruption Court Law, heavily regulated anti corruption portion', *Jakarta Post*, October 5, 2009.

¹²⁹ 'District Antigraft Courts Still a Long Way Off: Judges', *Jakarta Globe*, April 30, 2010.

¹³⁰ 'Lack of funding hampers the opening of local graft courts', *Jakarta Post*, May 15, 2010.

¹³¹ 'Dissenting opinion shows "serious" flaws in graft fight', *Jakarta Post*, January 13, 2011.

¹³² Ibid.

arguably, have to be heard career judges in the district courts until such time as those Tipikors are established.

Another troubling aspect of the new law is presented by Article 28, which requires the prosecution to obtain the Tipikor's permission before wiretapping a suspect. This contradicts Article 12(1)(a) of Law No. 30/2002, governing the KPK, that authorizes the Commission to wiretap a suspect without judicial supervision. Article 28 when read in conjunction with Article 1(4) of the new law raises the suspicion that the KPK would no longer be allowed to prosecute cases since the latter provision defines 'prosecutor' as 'public prosecutor' (*penuntut umum*), the term usually used to refer to lawyers working for the Attorney General's Office and does not specifically include the KPK within the definition. Certainly, the new law is ambiguous in this respect. Febri Diansyah of the ICW is concerned that a judge might interpret Article 1(4) as excluding the KPK from the definition of 'prosecutor'.¹³³

Perhaps most troubling of all is Article 26(3), which delegates to either the chief justice of the Supreme Court or the chief judge of the district court concerned the responsibility of determining the size and composition of the panels that preside over individual trials. The provision is vague as to the specific authority delegated to either the chief justice or the chief judges but it can certainly be read to authorize them to determine the ratio of career to ad hoc judges sitting on a panel. As noted above, the practice at the Tipikor since its establishment in 2002 is to favor a ratio of 3 to 2 of ad hoc to career judges. The prevailing opinion among commentators has been that it is this ratio that has made the Tipikor so effective at convicting corruption suspects and putting them behind bars. If chief judges or the chief justice can legally reverse the ratio to favor career over ad hoc judges, then the days of effective prosecution of corruption suspects would practically be over. In the eventuality that a court might someday interpret this provision as giving chief judges and the chief justice precisely this power, Tipikors would offer no real alternative to the district courts.

Given the prevalence of money politics, the dangerous ambiguities inherent in Law No. 46/2009 should not come as a surprise. Corruption is such a necessary part of gaining and maintaining a seat in the DPR. Indeed, given the recent revelations about corrupt practices in the DPR, it should not be a surprise to learn that only a minority of legislators have not been touched by corruption. It is certainly to be expected

¹³³ 'Corruption Courts: A "Middle of the Road" Policy', *Tempo Magazine*, No. 06/X, October 6-12, 2009.

that those involved in corrupt practices would not be in favor of the Tipikor's continued existence; at least not in its present form. Certainly, the presence of a number of legislators accused and convicted of being implicated in corruption does not bode well for the court's future.

III. Conclusion

The experience of the Commercial Court and the Tipikor shows that reformers must take heed of the political-economic terrain in which new courts are to be established since it is likely that a hostile reception awaits. Implementation of reform plans must pay attention to details because it is at this level that the best of intentions may go awry. In the case of the Tipikor, there was insufficient supervision on the part of reformist elements in Indonesia. Leaving the implementation of the Blueprint mostly in the hands of the Supreme Court predictably resulted in shoddy work. With hindsight, it should have been obvious that the very existence of the Tipikor impugned the collective self-worth of the career judiciary. The project of implementing the Blueprint was therefore bound to be taken on only with the greatest reluctance.

Without proper funding, any new enterprise is bound to founder. Therefore, one of the most important tasks of reformers is to make sure that the money will be available to insure success. In the case of the Tipikor, reformist elements failed to make sure that the Supreme Court made the proper effort to seek funding for the new court. There was certainly sufficient time for the Supreme Court to submit a supplementary budget request to the Ministry of Finance. It is unclear why salaries for the ad hoc judges could not have been processed in a timely manner. A best-case explanation was sheer inertia on the part of the Supreme Court brought on, perhaps, by its distaste for the project. A darker explanation, forwarded by the ad hoc judges themselves, may be that the delay was meant to encourage them to abandon the project or, worse still, to leave them vulnerable to the temptation to emulate the venal disposition of many of their career brethren. Perhaps a more vigilant attitude on the part of reformists with the financial aspects of the project could have avoided the controversies that eventually ensued.

But the most telling lesson of the Tipikor is that without new blood, new courts are unlikely to succeed. The most important contribution that reformists made to the project was to ensure that ad hoc judges would always be in the majority in any decision of whether or not to convict. They also provided invaluable service in making

sure that the recruitment process was objective and transparent. Without the ad hoc judges, it is unlikely that the Tipikor would have enjoyed the success that it did. The presence of ad hoc judges on the Commercial Court might have made a difference to its performance.

At this stage, the future of the Tipikor remains uncertain. The outcome depends on the passage of anti-corruption legislation. If the government's bill as drafted by Andi Hamzah were to be enacted, the KPK would be doomed and even if the Tipikor were to survive, anti-corruption efforts would largely wither away. Given the popularity of the KPK, it is unlikely that the government and the DPR would act to abolish them. But, as Law No. 46/2009 indicates, future legislation may be crafted in such a way as to minimize the effectiveness of the KPK and thus the Tipikor. Meanwhile, the Commercial Court has made something of a comeback in trademark cases. Linnan (2010) has argued that the reversal of the dismal trend in the court's jurisprudence can be explained by the relatively straightforward nature of trademark cases. But it could also be the case that trademark infringers tend to be politically unconnected and therefore inconsequential. It may very well be true that trademark cases are less complicated than bankruptcy cases, but it is also true that bankruptcy also presented a substantial threat to the country's political and economic elites.

Chapter 7

Conclusion

Judicial reform in post-Soeharto Indonesia has been a mixture of success and failure. As the thesis has shown, the Anti-Corruption Court (the Tipikor) has been successful, and so has the Constitutional Court (the Mahkamah Konstitusi, or MK). But these success stories have to be viewed in context. The Tipikor can be considered successful because it has done what it was designed to do: try those accused of corruption and, if it found them guilty, putting them behind bars. But its future effectiveness is less than assured because the Indonesian government recently enacted a bill (Law No. 46/2009) that has the potential to undermine the court. The new law has expanded the Tipikor's presence to every first-instance jurisdiction in which a district court also operates and made each Tipikor subservient to each district court by giving the chief judges in the latter supervisory power over the former, including the power to determine the size and composition of the Tipikor's judicial panels. The success that the Tipikor has enjoyed has been largely attributed to the presence of ad hoc, i.e., non-career, judges who are thought to be more honest and competent than their career brethren. These ad hoc judges always form the majority of each 5-judge panel. The new law would give the chief judge of each district court, or the chief justice of the Supreme Court, the power to reverse the ratio of ad hoc to career judges in each 3- or 5-judge panel. Given the notorious reputation that career judges have for corruption and incompetence, the new law has the potential of making the Tipikor indistinguishable from district courts. In short, the Tipikor's current effectiveness as a forum for corruption trials would be severely undermined. Thus far, the Indonesian government has also fallen short in providing the necessary funding to set up the extra anti-corruption courts. This may mean that many corruption suspects would have to be tried before ordinary district courts where a Tipikor has yet to be established since the new law provides that corruption suspects have to be tried in a Tipikor in the judicial district where the alleged corruption took place. Where a Tipikor has not been established, the new law went on to provide, suspects have to be tried in the district courts and not in the Jakarta Tipikor where all corruption trials thus far have been heard. How much longer the Tipikor will remain a success story is unclear at this point.

The MK has generally been considered as a fair and competent tribunal in which to resolve constitutional issues and election disputes. And, until recently, there

has been no hint of corruption or other impropriety involving any of its nine justices. In the October 25, 2010 edition of *Kompas*, a highly respected Indonesian-language daily newspaper, Refly Harun, a law professor who had worked as an expert staff member at the MK between 2003 and 2007, accused some MK justices of corruption in election dispute cases.¹ Incensed at the allegation, Chief Justice Mahfud MD challenged Refly to show evidence to substantiate his claim and offered to fund an official enquiry that Refly would lead.² Although the official enquiry declared that it had found prima facie evidence of corruption involving Justices Akil Mochtar and Arsyad Sanusi, the Court's own Ethics Council decided that one of the two justices had merely committed a breach of ethics and that there was insufficient evidence to support a charge of corruption against either justice.³ There was some indication that Justice Arsyad's daughter had engaged in verdict brokering but there was not enough evidence to show that the Justice himself had been aware of it. In the case at issue, however, Justice Arsyad had been the lone dissenter to decide in favor of the person alleged to have bribed his daughter. Whatever the real facts of the allegation against Arsyad, he chose to resign soon after the Ethics Council handed down its decision.⁴

Quite apart from its heretofore squeaky clean reputation, however, it would be inaccurate to view the MK as an unqualified success, if the criterion is whether the MK has gone a long way towards establishing a constitutional government in Indonesia. Its limited jurisdiction means that the MK is unable to assess the constitutionality of executive branch regulations even though such regulations constitute a considerable percentage of the laws extant in Indonesia. The Supreme Court, which has the power to scrutinize executive branch regulations, can only assess them for their consistency with the relevant statutes and not for their constitutionality. The MK is also unable to assess the constitutionality of local regulations which, as the thesis shows, are often discriminatory against women and racial minorities. Recent violence against the Islamic sect Ahmadiyah has led many local governments to enact regulations banning the sect in violation of the 1945 Constitution's guarantee of the freedom of religion

¹ 'MK masih bersih?' ['Is the MK still clean?'], *Kompas*, October 25, 2010.

² 'Corruption Allegations at Top Court to Be Probed', *Jakarta Globe*, October 29, 2010.

³ 'A Breach of Ethics', *Tempo Magazine*, No. 25/XI/February 16-22, 2011.

⁴ 'Shame Is Only Reason For Resigning: Justice', *Jakarta Post*, December 18, 2010.

(Articles 28E and 29) and freedom from discrimination (Article 28I(2)).⁵ These discriminatory local regulations remain on the books because, once again, the Supreme Court, which has the authority to review them, can only assess them for their consistency with national legislation governing local regulations and not for their constitutionality. Finally, the MK also lacks a constitutional complaint mechanism, which would have allowed the Court to protect individuals against illegal government and judicial actions that may have been carried out pursuant to otherwise constitutionally valid laws. Although the MK has been generally considered a success, its effectiveness as protector of the 1945 Constitution is limited.

If the successes of Indonesian judicial reforms must be qualified, the failures have sometimes been unmitigated. Perhaps the most notorious of these failures was the Commercial Court, which was set up during the final days of the New Order. There were suggestions that the Commercial Court failed because too much was expected of it much too quickly. Bankruptcy law is, after all, a complex field and the short period set aside for training the judges was insufficient given the complexity. As the thesis has shown, however, a closer analysis of the Court's early cases indicated that many of the mistakes made involved fundamental principles of substantive laws, such as contracts, corporations, and partnership and agency—principles that are regularly taught to students in law faculties everywhere and which, therefore, should have been familiar to the Court's judges even if they had been inexperienced with bankruptcy procedure. Although there is merit to the argument that too much was expected too quickly of the Court's judges, later cases of bankruptcy procedure being used to extort favorable settlement from defendants in contracts disputes show that the more likely explanation was probably corruption and perhaps political manipulation. The most pertinent lesson the Commercial Court had to offer subsequent reformers was that extreme care had to be taken when choosing judges to staff a new court. Ideally, non-career judges should also be recruited from academia and the private bar and carefully vetted for their integrity and competence. They should be seated alongside career judges and should form a majority of the panels that actually try cases. This was a lesson well learned by the designers of the Tipikor.

⁵ 'Pakistanization Of Indonesia?', *Jakarta Post*, March 7, 2011; 'Gov't Wipes Its Hands Of Ahmadiyah "Problem"', *Jakarta Post*, March 7, 2011; 'Ahmadiyah Bans Don't Violate Constitution: Ministry', *Jakarta Globe*, March 10, 2011.

Reformers' efforts to establish judicial independence through the "one-roof" system has also proved unsuccessful thus far. The strategy had been to prevent the executive branch from interfering in judicial affairs by taking away the justice minister's authority to determine the judiciary's budget and his power to determine the career paths of judges through promotions and placements. By giving the justice minister's authority and power to the Supreme Court, reformers had hoped to put the judiciary beyond the reach of the executive branch. But the strategy backfired and has made the judiciary less accountable rather than more independent. As the thesis has shown, judicial behavior since the advent of the "one-roof" system has not improved. Indeed, by making the judiciary less accountable, the strategy has made it easier for judges to engage in corruption. Making a corruption charge stick against a judge has become even more difficult. There is now no leverage that can be used against the judiciary. An attempt to rein in corrupt practices could be construed as an attempt to interfere with judicial affairs. The Judicial Commission, which was established to prevent judicial misconduct, in fact has almost no power to carry out its task. Individual whistleblowers against judicial corruption can very easily find themselves facing criminal defamation charges when accusing judges of misconduct. As for political manipulation, the "one-roof" system seems to have brought little relief. Prominent politicians caught with their hands in the cookie jar still escape justice, and many high-ranking military officers accused of gross human rights violations remain free and unpunished.

As this thesis has shown, the judiciary in Indonesia did not become corrupt and incompetent because of neglect. Rather, it was rendered dysfunctional through deliberate state policy because an honest and competent judiciary simply had no place in the patrimonialist politics that prevailed under the New Order and Guided Democracy. Indeed, an honest and competent judiciary would undermine the very basis of patrimonial rule. Hence, for judicial reforms to succeed in Indonesia, patrimonial rule first has to be destroyed. But, as it has been argued, patrimonialism supports a structure of power—political, economic, and social. It works as a set or matrix of informal institutions that lays out the ground rules about how power is obtained, maintained, and contested. In short, it has acted as the constitutional underpinning for the power structure in Indonesia. To the extent that patrimonialism had served as the 'constitution' for successive Javanese governments prior to Dutch colonialism, it had—through tradition—also given political legitimacy to Guided Democracy and the New Order. It should not come as a surprise that the individuals who have benefitted from patrimoni-

al rule—the elites—would do everything in their power to perpetuate this form of political domination. Thus, judicial reform is really the site of a struggle between the elites who want to preserve patrimonialism and the reformers who want to abolish patrimonial rule and replace it with a different system of political domination—one in which an honest and competent judiciary plays a central part.

In the democratic transition literature, judicial reform is a must for democratic consolidation because it is the necessary first step towards establishing the rule of law or constitutionalism. Without constitutionalism, democracy remains fragile. And countries that have transitioned towards democracy (free and fair elections) can easily revert to authoritarianism since democracy (majority rule) does not, in and of itself, impose rules that limit the power of the government. Strictly speaking, majority rule can be used to enact laws that disenfranchise and persecute minorities. Germany's Nuremberg Laws on ethnicity, for example, were used to persecute Jews, many of whom were natural-born German citizens. As Germany's experience with Nazism shows, unrestricted majoritarianism can easily lead to dictatorship. This is a valid line of thinking. But history shows that constitutionalism tends to precede democracy, not the other way around. The power of kings was first limited not by democratic rule, but by powerful barons. In 17th century England, constitutionalism in the form of the Bill of Rights of 1689 came with the abdication of James II, but democracy (one person, one vote regardless of status, gender, race, and property qualification) did not really arrive until 1928—239 years later—with the introduction of universal suffrage, when women were given the right to vote. In France, constitutionalism arrived on the heels of the Revolution of 1789 but women only got the right to vote in 1946—over 150 years later. In the United States, an oppressive state might have eventuated had the Confederacy won the Civil War. For African-Americans, constitutional rights theoretically came with the ratification of the 14th Amendment in 1868. But their right to vote, vouchsafed by the 15th Amendment—ratified in 1870—did not become a reality until 1964, with the passage of the Civil Rights Act and its subsequent enforcement in the southern states.

The important point to note here is that it was not democracy that brought about constitutionalism or the rule of law. Rather, constitutionalism was forced upon the government by a particular socio-economic class that saw their rights as being best protected by a strong and independent judiciary. This socio-economic class became the nucleus of a new elite that was economically powerful enough and sufficiently po-

litically motivated to fight for its class interest. In all these cases, the attempt to abolish the old institutions that supported the power structure of the *ancien regime* and to replace them with institutions that supported the emerging elite's interests resulted in violence. The old elite did not give way easily. The new elite had to pay with both treasure and blood, and only managed to impose its preferred system of political domination on the country by capturing the state and using it to do its bidding.

In chapter 3, the thesis showed that Indonesian reformers failed to capture the state. The *Reformasi* movement was never able to muster a coherent class interest around which its members could rally because the movement did not consist of a single socio-economic class. *Reformasi* was never more than a manifestation of "people power". As with any popular movement, the interests and motivation of its members were widely divergent. A cogent collective action plan was therefore difficult to initiate and even harder to maintain. The reformist lawyers never allied themselves with the radicals who wanted *Reformasi Total*. In the end, the movement for change was co-opted by members of the elite who maintained control of the political agenda. They manipulated the agenda to placate the popular demand for change and to accommodate the pressure exerted by multilaterals and bilaterals for the government to establish "good governance". But despite this pressure and the popular demand for change, the elites managed to resist those changes that would prove fatal to patrimonial rule. Given this context, resistance was never overt and sustained. Instead resistance was covert and came in fits-and-starts. Failure to fund or imposing too ambitious a plan that would only result in failure, as in the case of the Tipikor were examples of this strategy. Emasculating the effectiveness of the Tipikor through new legislation curbing the influence of ad hoc judges is another example.

Meanwhile, the continuing presence of essential elements of patrimonial rule—clientelism, corruption, and the rule of discretion—in post-Soeharto Indonesia suggests that elite resistance to reforms designed to bring about the rule of law will continue to erode real progress. Given this political context, it is difficult to see how judicial reforms would be properly implemented to bring about the rule of law. Yet, it is also difficult to see how the elite would manage to sabotage the process completely (and some members of the elite may not want to). This little bit of optimism is due in no small part to the freedom of the press that was re-introduced after the fall of the New Order. Constant public scrutiny through the media makes it difficult for the elites to dismantle *Reformasi* completely. But this little bit of optimism should be tempered by

real concerns that politicians are attempting to enact laws, such as the State Secrecy bill, that would restrict the freedom of the press.

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